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Supreme Court, U. S.
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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

SEPTEMBER TERM, 1980

MARLIN W. JOHNSTON, et al.,
Petitioners

vs.

DELFINO SILVA, et al.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Does the Supreme Court case of Chapman v. HWRO mean that jurisdiction will be assumed by federal courts whenever a constitutional claim is alleged, regardless of the actual substance of that claim?

2. Does a federal court have power to grant relief once the claim on which relief is based becomes moot?

3. Does the discretionary power of pendent jurisdiction extend to a claim unrelated to the primary constitutional challenge?

4. Does the Eleventh Amendment preclude an order of class notice where the State objects to the expense and where the expense is not merely ancillary to compliance with the injunction?

INTERESTED PARTIES

1. Marlin W. Johnston, individually and in his capacity as acting Commissioner of Human Resources, and the Texas Department of Public Welfare (currently the Texas Department of Human Resources), by and through their Attorney General, the Honorable Mark White and Kathryn A. Reed, Assistant Attorney General, P.O. Box 12548, Capitol Station, Austin, Texas, 78711.

2. Delfino Silva and Jose Miranda, by and through their attorney of record, Gerald A. Garcia, Texas Rural Legal Aid, Inc., 305 E. Jackson, Suite 206, Harlingen, Texas, 78550.

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DELFINO SILVA, et al.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATE COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on June 26, 1980, with rehearing denied August 20, 1980.

OPINION BELOW

The opinion of the Court of Appeals is reported at 621 F.2d 640, *sub. nom. Silva v. Vowell.* The opinion is attached as Appendix A hereto. Also attached are the Final Judgment (Appendix B); Memorandum regarding final judgment (Appendix C); and Memorandum and Order regarding Plaintiffs' Motion for Summary Judgment (Appendix D) that were appealed by Petitioners to the Court of Appeals; and notice of denial of Petitioners' Motion for Rehearing (Appendix E).

JURISDICTION

The opinion of the Court of Appeals was entered on June 26, 1980. A timely petition for rehearing with a suggestion for rehearing en banc was denied August 20, 1980. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) upon the basis that the opinion of the Court of Appeals conflicts with prior decisions of this Court and intrudes into an area of state discretion previously explicitly recognized by this Court.

STATUTES INVOLVED

28 U.S.C. § 1343(3):

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> . . .
>
> (3) to redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

STATEMENT OF THE CASE

This application is the result of a judgment of the Court of Appeals affirming a portion of the District Court's decision holding invalid one of Texas' eligibility standards for receipt of Aid to Families with Dependent Children (AFDC).

On December 10, 1975, Respondents Delfino Silva and Jose Miranda, applicants for AFDC benefits, filed suit against Raymond W. Vowell, individually and in his capacity as Commissioner of Public Welfare[1] and the Texas De-

[1] Marlin W. Johnston is currently the acting Commissioner of Human Resources.

partment of Public Welfare[2] on behalf of all Texas residents who had been denied or terminated from AFDC benefits on the basis that they were "capable of light work."[3] Jurisdiction was alleged pursuant to 28 U.S.C. §§ 1343, 1331, and 1337, and injunctive and declaratory relief and retroactive benefits were sought on the basis that the challenged regulation conflicted with federal law and denied Respondents equal protection. Due process violations were also alleged, but these were not pursued and were not considered by the Court of Appeals. On May 1, 1978, Respondents filed an Amended Motion for Preliminary Injunction stating that Texas' "capable of light work standard" was in conflict with the Social Security Act, and, additionally, that Texas' 60-day eligibility period for incapacity benefits was in contravention of the federal 30-day standard.[4] At the same time, Respondents filed a Motion for Summary Judgment based on the contention that both the "capable of light work standard" and the 60-day incapacity standard violated the Equal Protection, Due Process, and Supremacy Clauses. Respondents' accompanying Memoran-

[2]The Texas Department of Public Welfare is currently the Texas Department of Human Resources.

[3]The relevant portion of Section 2833 of the Texas AFDC Handbook stated:

> Eligibility may be established if a father has a partial incapacity of a permanent nature precluding him from substantial gainful employment during a major portion of the time as evidenced by a significant decrease in income. . . . For eligibility purposes, the test of incapacity is whether the applicant is capable of substantial gainful employment and not whether he can find a job in the area of his residence.

The federal regulation defined incapacity as any physical or mental defect, illness or disability. 42 C.F.R. § 233.90(c)(1)(iv).

[4]The relevant portion of Section 2830 of the Texas AFDC Handbook stated:

> The incapacity . . . must be expected to last for a period of at least 60 days.

Section 2832 also provided that parental incapacity must last for two months to qualify the family for AFDC benefits.

The federal regulation stated that the incapacity must "be expected to last for a period of at least thirty (30) days."

dum was based entirely on perceived violations of the Supremacy Clause. By stipulations filed May 11, 1978, both parties recognized that the challenge to the "capable of light work standard" had been mooted by a regulation change, and only the issue of the 60-day incapacity standard remained for determination. The District Court granted summary judgment for Respondents on the 60-day incapacity challenge, declaring it to be in violation of federal regulations. At a hearing on April 26, 1979, Petitioners presented a Motion to Dismiss based on the argument that jurisdiction could not be assumed under 28 U.S.C. § 1343(3) because Respondents' cause of action was actually based on the Supremacy Clause and therefore did not constitute a substantial constitutional question. Petitioners also opposed class certification, pointing out that the "capable of light work standard" under which the named plaintiffs had been evaluated had been changed and that the challenged 60-day standard was a completely different regulation and had never been applied to Respondents. Finally, Petitioners objected to the cost of preparing and mailing class notice of change in regulations. The District Court subsequently denied Petitioners' Motion to Dismiss, certified a class composed of those who had been subjected to the "capable of light work standard" and the 60-day incapacity standard, and ordered that class notice be sent to those groups. The District Court's memorandum of July 3, 1979, recognized that at the time of the judgment the "only issue which clearly remained . . . was the issue of inconsistency with federal law," but found that a substantial constitutional violation had been alleged which conferred jurisdiction over the statutory claim.

Petitioners perfected their appeal to the Court of Appeals for the Fifth Circuit. A panel of that Court held that (1) the initial allegation of violation of equal protection with regard to the "capable of light work standard" raised a sufficiently substantial constitutional question to give the Court jurisdiction pursuant to 28 U.S.C. § 1343(3), (2) that mootness of the challenge to the "capable of light work standard" did not deprive the District Court of jurisdiction

over either statutory claim, (3) that the issue of the 60-day incapacity standard should be remanded for intervention of a proper class representative, and (4) that the award of class notice at Defendants' expense did not abridge Eleventh Amendment principles. The dissent disagreed with the affirmance of the award of notice to class members who were denied benefits under the "capable of light work standard" on the basis that that issue had been mooted without a judicial determination of liability and without findings which might allow such relief under Rule 23(d)(2), Federal Rules of Civil Procedure. On August 20, 1980, Petitioners' Motion for Rehearing was denied.

Petitioners now file this Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

Although it is now clear that an allegation of conflict between state and federal regulations is not sufficient to raise a substantial constitutional challenge for the purpose of conferring jurisdiction pursuant to 28 U.S.C. § 1343(3), *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600 (1979), a more difficult question arises in individual cases as to whether such a challenge is raised. In the instant case, the majority panel held that Respondents' challenge to Texas' capable of light work standard for AFDC eligibility raised an issue of sufficient constitutional dimension to allow the District Court to assume jurisdiction over the case because the standard distinguished between "children who were needy because their fathers were totally disabled and children who were needy because their fathers were . . . unable to obtain work because of a lack of skill and the realities of the job market" (emphasis omitted). If such an assumption of jurisdiction were correct, it would allow the Court to determine any related statutory claims without deciding the equal protection question. *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966). However, since jurisdiction may not be "maintained by mere averment," if a plaintiff's "allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by com-

petent proof." *McNutt v. General Motors Acceptance Corporation of Indiana*, 298 U.S. 178, 189 (1936). Likewise, "in order to *obtain* jurisdiction, the constitutional claim(s) should be examined first." *Gonzalez v. Young*, 560 F.2d 160, 165 n. 1 (3rd Cir. 1977), *affirmed sub. nom., Chapman v. Houston Welfare Rights Organization*, *supra*.

In the instant case, an examination of the complaint and subsequent pleadings by Respondents shows that considerably more emphasis was placed on the Supremacy Clause claim than the alleged Equal Protection violation.[5] Although "the claimant who challenges the statute bears the burden of affirmative demonstration that . . . its classifications lack rationality." *McGowan v. Maryland*, 366 U.S. 420, 535 (1961) (Frankfurther, J., in separate opinion), the majority panel correctly pointed out that Plaintiffs' Equal Protection challenge "was not fleshed out in the complaint" and was not even explained until questioned in the Court of Appeals.

However, the majority panel held that Respondents' bare allegation of Equal Protection was sufficient to confer federal jurisdiction. In this case, as in *McGowan*,

> [t]he record is barren of any indication that [an] apparently reasonable basis does not exist, that the statutory distinctions are invidious, that local tradition and custom might not rationally call for this legislative treatment.

McGowan at 426–427. In light of the judiciary's reluctance to subject local fiscal schemes to widespread Equal Protection challenges, *San Antonio School District v. Rodriguez*,

[5]Plaintiffs' Original Complaint alleges an Equal Protection violation without explanation, Plaintiffs' Amended Motion for Preliminary Injunction fails to even mention the "substantial" Equal Protection claim, and Plaintiffs' Memorandum in Support of Motion for Summary Judgment requests only that the District Court find the challenged provisions invalid under the Supremacy Clause.

411 U.S. 1, 41 (1973),[6] the presumed constitutionality of questioned state legislation, *McGowan*, *supra* at 425–426, and the Respondents' total failure to demonstrate any invidious or irrational basis for the challenged regulation, jurisdiction should not have been assumed by the District Court without further inquiry into the facts of this case.[7]

Because Respondents failed to prove irrationality when challenged or even explain the basis of their challenge until reaching the Court of Appeals, the District Court erred in holding that a substantial constitutional question existed for purposes of 28 U.S.C. § 1343(3). Such a holding is precluded by the policy behind notice pleadings and this Court's holding in *Chapman v. Houston Welfare Rights Organization*. At some point the court must decide whether a plaintiff's complaint is substantial and supports jurisdiction or is insubstantial and merely employs the proper

[6]Federal Courts have traditionally refused to strike down state regulations in the social and economic field where the challenge does not involve a suspect class or fundamental right. *See*, *e.g.*, *Jefferson v. Hackney*, *supra* at 546–547; *Dandridge v. Williams*, 397 U.S. 471, 487 (1970); *McGowan v. Maryland*, *supra* at 425–426; *Clark v. Paul Gray, Inc.*, 306 U.S. 583, 596 (1939); *Lindsley v. National Carbonic Gas Company*, 220 U.S. 61, 78–79 (1911). Assuming *arguendo* that *Hagans v. Lavine*, 415 U.S. 528 (1974), remains unaffected by the Supreme Court decision in *Chapman v. Houston Welfare Rights Organization*, *supra*, this principle is so well settled that a mere allegation of "irrationality" without explanation or proof requires dismissal as "foreclosed by prior decisions of [the Supreme] Court." *Hagans* at 542.

[7]A holding that a plaintiff need only *plead* a substantial constitutional question without demanding proof that such a question actually exists, even after the defendant raises the issue, would mean that any plaintiff dissatisfied with a state program could obtain jurisdiction for a broad-based attack merely by *alleging* violation of a clearly protected constitutional right, *e.g.*, freedom from racial discrimination, right to travel, even if such a violation did not exist. If such "jurisdiction by pleading" were permissible, it could be assumed that the Supreme Court would have remanded *Gonzales v. Young*, *supra*, so the plaintiffs there could attempt to formulate a sufficiently substantial constitutional allegation rather than affirming the Third Circuit's dismissal. *Chapman v. Houston Welfare Rights Organization*, *supra*.

words to get into federal court even though the facts alleged constitute no real constitutional violation.

II.

When Respondents' Original Complaint was filed, it dealt with only one issue—their challenge to Texas' "capable of light work" standard. The amended motion for summary judgment filed on May 1, 1978, raised the new contention that Texas' sixty-day incapacity standard was in conflict with federal regulations. As was indicated by the parties' stipulations filed on May 11, 1978, and by Petitioners' Opposition to Respondents' Motion for Summary Judgment filed on May 26, 1978, the regulation regarding the capable of light work standard had been changed and that issue was therefore moot. In spite of the mootness of that issue, the District Court on July 3, 1979, ordered that class notice be sent to those denied AFDC benefits under the original capable of light work standard; no finding of invalidity had ever been made regarding the regulation.

The dissent in the Court of Appeals disagreed with the majority panel's approval of the order requiring Defendants to bear the expense of mailing notice to class members denied benefits under the capable of light work standard because "[o]rdinarily, a court has no power to grant relief, even equitable relief, once the claim for relief has become moot." Absent findings by the District Court as to why such an unusual order was appropriate, the dissent concluded that the order should be reversed and remanded.

A case ceases to be a live controversy if the possibility of recurrence of the alleged violation is only a "speculative contingency." *Hall v. Beals*, 396 U.S. 45, 49 (1969); *see Super Tire Engineering Company v. McCorkle*, 416 U.S. 115, 122 (1974). In the instant case, Respondents received all requested relief as to the capable of light work standard more than a year before the class notice order was entered.

It is well-settled that

> [i]n cases in which the alleged harm would not dissipate during the normal time required for resolu-

> tion of the controversy, the general principles of Article III jurisdiction require that the plaintiff's personal stake in the litigation continue throughout the entirety of the litigation.

Sosna v. Iowa, 419 U.S. 393, 402 (1975). Thus, when the challenged action in the instant case ceased to exist, the District Court was no longer faced with "questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process," *Flast v. Cohen*, 392 U.S. 83, 95 (1968), and the order of class notice regarding the mooted issue was improper. *See Weinstein v. Bradford*, 423 U.S. 147 (1975).

III.

As previously noted, the United States Constitution restricts federal courts to determination of cases or controversies. U.S. CONST. art. III § 2. In order to be considered a "case or controversy" a cause of action must raise a real and substantial controversy. *Aetna Life Insurance Company v. Haworth*, 300 U.S. 227, 240–241 (1937). In the instant case, not only was no named plaintiff ever subjected to the challenged sixty-day incapacity standard, but the constitutional claim through which the District Court assumed jurisdiction—the invalidity of the capable of light work standard—was mooted prior to the Court of Appeal's consideration of the durational incapacity standard. The majority panel relied on the case of *Rosado v. Wyman*, 397 U.S. 397 (1970), for the proposition that the mooting of a primary constitutional claim through which a federal court assumes jurisdiction does not eliminate the Court's pendent jurisdiction over a related statutory claim arising from a common nucleus of operative fact.

Assuming *arguendo* that the *Rosado* rationale continues in full force and effect,[8] the facts in the instant case do not

[8]Two issues should be noted with regard to the *Rosado* decision. First, unlike the instant case, "there was no intimation that the constitutional claim was a weak one pleaded for the purpose of securing federal jurisdiction over a stronger claim." *Hagans v. Levine*, 415 U.S.

sufficiently fulfill the criteria for pendent jurisdiction in order to have allowed the District Court to consider the sixty-day incapacity issue in the first instance, or to reconsider it on remand. In *Rosado*, as correctly pointed out by the majority panel, "the mooted constitutional claim concerned the *identical statutory provision* attacked on both constitutional and pended Supremacy Clause grounds" (emphasis added). The statutory issue in *Rosado* remained alive after a regulation change only because the amended standard allowed for discretionary, rather than the requested mandatory, distribution of benefits.

In the case at hand, both the primary constitutional challenge to the capable of light work standard and the identical statutory contest were mooted by the same regulation change. The majority panel dismissed this distinction by stating that the mooted capable of light work standard and the remaining sixty-day incapacity standard were "very closely related," and therefore the District Court could assume pendent jurisdiction over the latter. While it is true that application of either standard could "prevent initial eligibility or else . . . terminate benefits once commenced," the same could be said of *any* AFDC eligibility standard. A challenge to one eligibility criterion does not constitute a challenge to all eligibility standards. Nor can the fact that all eligibility requirements are applied to all applicants and recipients make independent challenges to different regulations arise out of the same "nucleus of operative fact." *See Richardson v. Belcher*, 404 U.S. 78, 83 (1971). This absence of a sufficient nucleus of operative fact between the constitutional challenge to the capable of light work standard and the "pendent" attack on the sixty-day incapacity standard is demonstrated by the majority panel's refusal to allow the initial named plaintiffs to challenge not only the capable of light work standard but also the sixty-day incapacity standard to which they had never been subjected.

528, 560 (1974) (Powell, J., dissenting). Second, *Rosado* is one of the cases which the dissent in *Chapman v. Houston Welfare Rights Organization* points out could no longer be heard in federal court. *Chapman*, *supra* at 1945.

Finally, the majority panel rested its decision that the challenge to the sixty-day incapacity standard could have been appended to Respondents' constitutional attack on the capable of light work standard on language from *Hagans v. Levine*, 415 U.S. 528, 548 (1974), which states that

> . . . where the pendent claim is *federal* but is itself beyond the jurisdiction of the District Court. . . . [,] the federal court's rendition of federal law will be at least as sure-footed and lasting as any judgment from the state courts.

While the federal court's expertise in examining and determining issues involving federal statutes is beyond dispute, it is now clear that there are questions of federal law over which federal courts have no jurisdiction. "[T]here are statutory rights which Congress has decided cannot be enforced in the federal courts unless 28 U.S.C. § 1331(a)'s $10,000 jurisdictional amount is satisfied." *Maine v. Thiboutot*, _____ U.S. _____, 100 S.Ct. 2502, n. 6 (1980); *see also Jarrett v. Jarrett*, 400 NE2d 421 (1979), *cert. denied*, 49 U.S.L.W. 3283 (1980). In light of the absence of either an initial substantial constitutional claim or of a common nucleus of operative fact—by similarity of statutes or by application of those statutes to Respondents—this is such a case. The District Court's order regarding the sixty-day incapacity standard was in error, and remand for further consideration of that issue is inappropriate.

IV.

The majority panel held that although the class notice need not be mailed to those class members affected by the sixty-day incapacity standard until after that issue is considered on remand, the order requiring that notice be sent at Petitioners' expense to those denied benefits under the capable of light work standard should be upheld as not violating the Eleventh Amendment prohibition on awarding payment of funds from the State Treasury. The panel's decision rests first on the Supreme Court's approval of class

notice to be mailed by the defendants in *Quern v. Jordan*, 440 U.S. 332 (1979) and attorneys' fees to be paid by the defendants in *Hutto v. Finney*, 437 U.S. 678 (1978). These cases are distinguishable, however, in that there the defendants "raised no objection to the expense of mailing and sending" the notice, *Quern* at 349, the cost of identifying class members and mailing notice was merely the expense of running the defendants' computer and including the notice in regular monthly mailings, *Quern* at 335, n. 3, and the defendants did not argue that the "award was so large or so unexpected that it interfered with the State's budgeting process," *Hutto* at 692, n. 18. In the instant case, Petitioners contested the award, and in conjunction with that contest supplied the trial court with a break-down and explanation of the cost.

The third case on which the majority relied, *Milliken v. Bradley*, 433 U.S. 267 (1977), is likewise distinguishable from the case at bar. In *Milliken*, where the defendants were orderd to bear the cost of complying with a desegregation order, the Court pointed out that state officials may be ordered to "*conform their conduct* to requirements of federal law, notwithstanding a direct and substantial impact on the state treasury." *Milliken* at 289 (emphasis added). Thus, the *Milliken* order merely required the defendants to bear the ancillary cost of complying with the injunction itself and did not deal with the imposition of an independent liability. The award in the instant case therefore meets neither of the two exceptions to Eleventh Amendment immunity; it is not an uncontested, incidental expense as in *Quern* and *Hutto*, nor is it the ancillary expense Petitioners have already borne in complying with the injunction itself as in *Milliken*. An award of class notice in this case is comparable to the award of retroactive benefits rejected by the Supreme Court in *Edelman v. Jordan*, 415 U.S. 651 (1974).

> . . . where the State has a definable allocation to be used in the payment of public aid benefits, and pursues a certain course of action such as the pro-

> cessing of applications within certain time periods . . ., the subsequent ordering by a federal court of retroactive payments to correct delays in such processing will invariably mean there is less money available for payments for the continuing obligations of the public aid system.

Edelman at 666, n. 11.

CONCLUSION

The decision of the Court of Appeals for the Fifth Circuit conflicts with prior decisions of this Court and intrudes into an area of state discretion explicitly recognized by this Court. In addition, that decision decides an important question of federal law in a way in conflict with applicable decisions of this Court. Accordingly, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit Court of Appeals herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, David H. Young, Assistant Attorney General, do hereby certify that 3 true and correct copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has been sent to Mr. Gerald A. Garcia, Texas Rural Legal Aid, Inc., 305 E. Jackson, Suite 206, Harlingen, Texas, 77550, by United States Postal Service, Certified, Return Receipt Requested, this 18 day of November, 1980.

DAVID H. YOUNG
Assistant Attorney General

APPENDIX A

Delfino Silva and Jose Miranda, Jr., Individually and on behalf of all others similarly situated, Plaintiffs-Appellees,

v.

Raymond W. VOWELL, Individually and in his capacity as Commissioner of the Texas Department of Public Welfare, and the State Department of Public Welfare, Defendants-Appellants.

No. 79–2905.

United States Court of Appeals,
Fifth Circuit.

June 26, 1980.

Rehearing and Rehearing En Banc
Denied Aug. 20, 1980.

Class action was brought challenging Texas incapacity eligibility standard for AFDC benefits. The United States District Court for the Southern District of Texas, Reynaldo G. Garza, J., rendered summary judgment for plaintiffs on the only substantive claim that had not been mooted by revision of the regulations and appeal was taken. The Court of Appeals, Tate, Circuit Judge, held that: (1) there was a substantial constitutional equal protection claim cognizable under Civil Rights Act and related jurisdiction statute and, hence, court had pendent jurisdiction over supremacy clause claim, i.e., that state standards conflicted with Social Security Act and regulations; (2) mootness of constitutional challenge to the "capable of light work" facet, under which named plaintiffs had been denied benefits, did not deprive court of discretion as to whether to exercise jurisdiction over 60-day disability requirement which had not been applied to named plaintiffs; (3) in view of combination of standing and mootness problems created by mooting of "capable of light work" challenge prior to certification, the court should not have exercised jurisdiction over the 60-

day challenge without presence of a named plaintiff who had been directly injured by such facet; and (4) there was no Eleventh Amendment bar to having defendants bear cost of mailing explanatory notice to the class.

Affirmed and modified in part, and vacated and remanded in part.

Tjoflat, Circuit Judge, filed concurring and dissenting opinion.

1. Federal Courts—244

Civil Rights Act of 1871 and related jurisdiction statute did not give district court jurisdiction over class actions suit challenging Texas incapacity eligibility standards for AFDC program unless plaintiffs presented a substantial constitutional claim, and absent such a claim the court did not have independent federal jurisdiction over supremacy clause claim, i.e., that state regulations conflicted with Social Security Act and regulations. 28 U.S.C.A. §§ 1331, 1343; 42 U.S.C.A. § 1983; Social Security Act, § 401 et seq., 42 U.S.C.A. § 601 et seq.; U.S.C.A. Const. Art. 6, cl. 2; Amends. 5, 14.

2. Federal Courts—14

A federal court has discretion to exercise pendent jurisdiction over a claim not otherwise cognizable in federal court as long as the court has jurisdiction over one claim and the pendent claim derives from the same common nucleus of operative fact. U.S.C.A. Const. Art. 3, § 1 et seq.

3. Federal Courts—244

Although equal protection challenge to "capable of light work" facet of Texas incapacity eligibility standard for AFDC benefits was not fleshed out in the complaint, a substantial constitutional question, for purpose of jurisdiction under Civil Rights Act and related jurisdiction statute, was presented in view of argument that standard irrationally discriminated between children who were needy because their fathers were totally disabled and children who were needy because their fathers were completely unable to obtain work because of lack of skills and job market real-

ities even though "capable of light work." Social Security Act, § 401 et seq., 42 U.S.C.A § 601 et seq.; 28 U.S.C.A. §§ 1331, 1343; 42 U.S.C.A. § 1983; U.S.C.A. Const. Art. 6, cl. 2; Amends. 5, 14.

4. Federal Courts—18

Equal protection challenge to "capable of light work" and 60-day disability facets of Texas incapacity eligibility standard for AFDC benefits were not merely claims that such facets conflicted with federal law, thereby depriving district court of the substantial constitutional challenge necessary to entertain pendent claim of conflict between such standards and Social Security Act and regulations, on ground that plaintiffs relied on rights originating from federal regulations as "origin of the right" theory has no relevance to equal protection analysis and only issue was whether the state had a rational basis for its different treatment of persons arguably similarly situated. 28 U.S.C.A. §§ 1331, 1343; 42 U.S.C.A. § 1983; Social Security Act, § 401 et seq., 42 U.S.C.A. § 601 et seq.; U.S.C.A. Const. Art. 6, cl. 2; Amends. 5, 14.

5. Constitutional Law—213.1(2)

A state violates the equal protection clause when it irrationally treats differently those similarly situated or when it irrationally treats similarly those people situated differently. U.S.C.A. Const. Amends. 5, 14.

6. Constitutional Law—211(1)

Aside from determining the levels of scrutiny to be applied there is no issue in equal protection claim concerning the right of anyone to anything other than similar treatment of similar individuals. U.S.C.A. Const. Amends. 5, 14.

7. Federal Courts—18

Although a claim may be stronger statutorily than constitutionally, federal courts have discretion to hear a pendent statutory question involving federal law and federal policy, rather than perforce to dismiss the claim and relegate it to a state forum. 28 U.S.C.A. § 1343.

8. Federal Courts—18

A federal court has jurisdiction unless a constitutional claim is wholly unsubstantial. 28 U.S.C.A. § 1343.

9. Federal Courts—18

Fact that a substantial constitutional claim becomes moot during the litigation does not deprive the federal court of pendent jurisdiction over a related statutory claim. 28 U.S.C.A. § 1343.

10. Federal Courts—18

Mootness of equal protection attack on "capable of light work" facet of Texas incapacity eligibility standard for AFDC benefits did not deprive district court of all discretion to exercise pendent jurisdiction over claim that 60-day disability requirement violated Social Security Act and regulations as both facets were attacked on equal protection grounds as irrationally creating two classes of needy children, there was a sufficient common nucleus of operative facts and constitutional and statutory claims were four intertwined strands of "the same ball of wax." 28 U.S.C.A. § 1343; 42 U.S.C.A. § 1983; Social Security Act, § 401 et seq., 42 U.S.C.A. § 601 et seq.; U.S.C.A. Const. Amends. 5, 14.

11. Federal Courts—18

Finding that mootness of original constitutional claim did not deprive district court of discretion as to whether to exercise jurisdiction over pendent statutory claim did not necessarily mean that court's discretion, i.e., consideration of pendent claim, was properly exercised.

12. Federal Courts—18

Although decision to exercise pendent jurisdiction over statutory attack on 60-day disability requirement of Texas incapacity eligibility standard of AFDC benefits was discretionary notwithstanding mooting of constitutional challenge to the "capable of light work" facet under which named plaintiffs had been denied benefits, the court should not have considered merits of the former without a named plaintiff who had been directly injured by the 60-day re-

quirement, in view of combination of standing and mootness problems created by mooting of the "capable of light work" challenge prior to certification of class. Fed. Rules Civ. Proc. Rule 23(c)(1, 4), 28 U.S.C.A.; 28 U.S.C.A. § 1343; 42 U.S.C.A. § 1983; Social Security Act, § 401 et seq., 42 U.S.C.A. § 601 et seq.; U.S.C.A. Const. Amends. 5, 14.

13. Federal Courts—937
Social Security and Public Welfare—194.21

If the class, i.e., Texas residents whose applications for AFDC benefits were affected because of "capable of light work" and 60-day disability requirement of incapacity eligibility standard, had been properly certified before mooting of constitutional challenge to the "capable of light work" facet under which named plaintiffs had been denied benefits the challenge to the 60-day requirement would not necessarily have been mooted; however, mooting brought named plaintiffs' standing into question and remand for intervention by someone affected by the challenged standard was appropriate, notwithstanding that defendants' conduct was largely responsible for class action treatment up to the very final moments. Fed. Rules Civ. Proc. Rule 23(c)(1, 4), 28 U.S.C.A.; 28 U.S.C.A. § 1343; 42 U.S.C.A. § 1983; Social Security Act, § 401 et seq., 42 U.S.C.A. § 601 et seq.; U.S.C.A. Const. Amends. 5, 14.

14. Federal Civil Procedure—177

Although in view of vacation of ruling that 60-day disability requirement of Texas AFDC eligibility standard was unconstitutional the defendants were entitled not to send a notice to anyone injured by such facet of the standard, plaintiffs were still entitled to have appropriate notice to all class members who had been denied benefits because of "capable of light work" facet of the eligibility standard, as named plaintiffs at all times were proper representatives of such subclass and were entitled to such notice. Social Security Act, § 401 et seq., 42 U.S.C.A. § 601 et seq.

15. Federal Courts—268

Notice to those class members who had been denied ben-

efits under the "capable of light work" facet of Texas incapacity eligibility standard for AFDC was merely ancillary relief in action challenging validity of standards, with notice explaining that the regulations had been changed and that class members had a right to reapply for benefits, and assertion that it would cost too much, i.e., almost $80,000, was insufficient to invoke proscriptions of the Eleventh Amendment. Social Security Act, § 401 et seq., 42 U.S.C.A. § 601 et seq.; U.S.C.A. Const. Amend. 11.

16. Federal Courts—268

Cost of notice to class members explaining that challenged incapacity eligibility standard for AFDC had been changed and that members had a right to reapply for benefits was not dispositive of Eleventh Amendment issue as it is the character of expense, whether "ancillary" or not, rather than the amount that was determinative of the Eleventh Amendment claims and, in any event, financial impact is on a state's budget, not that of a single administrative agency. Social Security Act, § 401 et seq., 42 U.S.C.A. § 601 et seq.; U.S.C.A. Const. Amend. 11.

Kathryn A. Reed, Asst. Atty. Gen., Austin, Texas., for defendants-appellants.

Gerald A. Garcia, Texas Rural Legal Aid, Inc., Harlingen, Tex., Jose Antonio Gomez, Oficina Legal Del Pueblo Unido, San Juan, Tex., for plaintiffs-appellees.

Appeal from the United States District Court for the Southern District of Texas.

Before TJOFLAT, RUBIN and TATE, Circuit Judges.

TATE, Circuit Judge:

This class action suit challenges the Texas incapacity eligibility standard for receipt of benefits under the Aid to Families with Dependent Children (AFDC) program. The plaintiffs, Delfino Silva and Jose Miranda, are AFDC applicants, and they filed a class action in December of 1975 attacking the Texas incapacity standard. Without detailing the specifics of their complaint, it is sufficient for the mo-

ment to say that the district judge granted summary judgment for the plaintiffs on the only substantive claim that had not been mooted by a subsequent revision of the Texas regulations. Further, although retroactive benefits were denied, the court certified the class and ordered the defendants to pay for preparing and mailing an explanatory notice to the class members, explaining that the regulations had been changed and that the class members had a right to reapply for benefits. The defendants, the Texas Department of Public Welfare (currently the Texas Department of Human Resources) and its Commissioner, Raymond W. Vowell, now appeal from the district court's ruling on the following grounds: 1) that the district court lacked jurisdiction over the subject matter of this litigation; 2) that the named plaintiffs do not have standing to represent the class; and 3) that requiring the defendants to bear the expense of preparing and mailing the notice to the class violates the Eleventh Amendment. For the reasons discussed below, we affirm in part and remand in part.

Context of the Issues

As will be more particularly shown in an appendix to this opinion (*History of the Litigation*), the attack by the defendants on the trial court's jurisdiction and the plaintiffs' standing to continue this class action arises in the following context.

The class action suit, as initially brought in 1975, contested primarily the eligibility requirement for aid to dependent children that disqualified the families of dependent children from such aid if the father was "capable of light work." There is no doubt that both plaintiffs had standing to assert such claim as class representatives. In May, 1978, the suit was broadened to attack other facets of the disability requirements, including pertinently the requirement that prevented the families of dependent children from receiving welfare payments unless their fathers would be (or would continue to be) disabled for sixty days or more. At this time, the defendants stated (admittedly in equivocal terms, see note 12, *infra*) that they had no objection to certification of the class. At the same time, a show-

ing was made that administrative revision of the other disability requirements in the Texas AFDC Handbook would moot all of the plaintiffs' substantive contentions except that pertaining to the sixty-day disability requirement. In December, 1978, the district court granted summary judgment for the plaintiffs invalidating the sixty-day requirement.

In April, 1979, the defendants for the first time filed a motion to dismiss for want of jurisdiction. The defendants also objected for the first time that the plaintiffs were not adequate class representatives because they themselves had not been denied benefits because of the sixty-day eligibility period but rather because they were "capable of light work." As the district court noted, the invalid "capable of light work" requirement had been revised as a result of this class action; one consequence of the judgment below is that the defendants must send out notices to all applicants who were denied, improperly, eligibility for welfare benefits by reason of this requirement. However, the certification of the class—*to which no objection by the defendants had been urged in May, 1978* and the description of which the defendants had approved when it was formalized in June, 1979—included all Texas residents who since October, 1976 had had applications for AFDC welfare payments rejected or benefits terminated because of the improper Texas disability standard (including both the "capable of light work" and the sixty-day disability requirements). The record also shows that the plaintiff Silva, although now receiving AFDC payments because of the elimination of the "capable of light work" requirement, is subject to termination of his benefits by reason of the sixty-day disability requirement should his disability lessen into one of this temporary duration.

I.

[1] The first issue that must be resolved is whether the district court had jurisdiction. The defendants rely on the Supreme Court's holding in *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 99 S.Ct. 1905, 60

L.Ed.2d 508 (1979), that a federal court has no jurisdiction under 28 U.S.C § 1343[1] and 42 U.S.C. § 1983[2] to hear a claim that is wholly based on a conflict between state and federal law.[3] In view of *Chapman*, it is not disputed that

1. 28 U.S.C. § 1343 provides:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> (1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citzen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;
>
> (2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;
>
> (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

2. 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress.

3. In *Chapman*, the Supreme Court held that there is no jurisdiction under 28 U.S.C. § 1343 and 42 U.S.C. § 1983 to hear a case claiming that a state law conflicts with the Social Security Act because: 1) an alleged violation of the Supremacy Clause "does not, in itself, give rise to a claim 'secured by the Constitution' within the meaning of [28 U.S.C.] § 1343(3)," 99 S.Ct. at 1915; and 2) the Social Security Act is not a statute providing for "equal rights" within the meaning of § 1343(3) or "civil rights" within the meaning of § 1343(4), *id.* 99 S.Ct. at 1917–18.

the district court did not have jurisdiction unless the plaintiffs presented the court with a substantial constitutional claim.[4]

The plaintiffs argue that the district court correctly ruled that there was a substantial constitutional claim and that consequently the court had pendent jurisdiction over the statutory claim concerning a conflict between state and federal law.[5] The defendants, on the other hand, contend: a) that there never was a substantial constitutional claim; and b) that the plaintiffs' allegedly substantial constitutional claims are really nothing more than an attempt to circumvent the ruling in *Chapman*.

(a) Was There a Substantial Constitutional Claim?

[2] *Chapman* makes it clear that the court in the instant case did not have independent federal jurisdiction over the Supremacy Clause claim. However, the district court had the power to exercise pendent jurisdiction over the statutory conflict claim if it had jurisdiction over a related and substantial constitutional claim. A federal court has discretion to exercise pendent jurisdiction over a claim not otherwise cognizable in federal court as long as the court has jurisdiction over one claim and the pendent claim derives from the same "common nucleus of operative fact." *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 725, 86 S.Ct. 1130, 1138, 16 L.Ed.2d 218 (1966); *Kimbrough v. Arkansas Activities Association*, 574 F.2d 423, 427 (8th Cir. 1978). Although pendent jurisdiction is often exercised

4. There was no federal question jurisdiction under 28 U.S.C. § 1331 over the Supremacy Clause claim because the plaintiffs lacked the requisite $10,000 jurisdictional amount. Although there were several alleged bases for jurisdiction in the complaint, plaintiffs now rely solely on 28 U.S.C. § 1343 and 42 U.S.C. § 1983 and pendent jurisdiction.

5. The issue of pending a statutory claim with a substantial constitutional claim was not considered in *Chapman* because no constitutional claim, aside from the Supremacy Clause claim, was at issue. However, such an exercise of pendent jurisdiction has been used in several other cases, *e. g.*, *Hagans v. Lavine*, 415 U.S. 528, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974); *Rosado v. Wyman*, 397 U.S. 397, 90 S.Ct. 1207, 25 L.Ed.2d 442 (1970).

when a related state claim is pended to a federal claim, in the instant case, the plaintiffs attempted to pend one federal claim (their Supremacy Clause claim or statutory claim) to another federal claim (their Due Process and Equal Protection Clause claims). The question with respect to jurisdiction is whether the plaintiffs presented the court with a substantial federal constitutional (Equal Protection or Due Process) claim such that the court had the power to exercise pendent jurisdiction over the statutory conflict (Supremacy Clause) claim.

[3] Pretermitting any discussion of the plaintiffs' Due Process claim, which was not diligently pursued in the lower court, it is clear that the plaintiffs' initial complaint raised a substantial Equal Protection claim. Although, the argument was not fleshed out in the complaint, the plaintiffs argue on appeal that the Texas "capable of light work" standard unlawfully and irrationally discriminated between children who were needy *because their fathers were totally disabled* and children who were needy *because their fathers were completely unable to obtain work even though only partially disabled and "capable of light work."* The plaintiffs contend that the Texas "capable of light work" standard irrationally ignored the fact that children of partially incapacitated fathers are just as needy as children of totally incapacitated fathers, when the partially incapacitated fathers, although theoretically "capable of light work," are unable to obtain work because of a lack of skill and the realities of the job market. This presented a substantial constitutional question, for purposes of a federal district court's power to determine a related pendent claim not based on constitutional deprivation.

In *Hagans v. Lavine*, 415 U.S. 528, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974) the Supreme Court considered almost the exact question that we face today—was there a sufficiently substantial constitutional claim to support the lower court's exercise of pendent jurisdiction over a related statutory claim? Both *Hagans* and the instant case must be distinguished from *Chapman*, because in *Chapman* there was no constitutional claim at all. In *Hagans*, however,

AFDC recipients in New York attacked a New York regulation (requiring recoupment of certain benefits) on two grounds: 1) that the New York regulation violated the Equal Protection Clause; and 2) that this same regulation was inconsistent with the Social Security Act and the regulations promulgated thereunder. The district court found the constitutional claim to be substantial and exercised pendent jurisdiction over the "statutory" claim. In order to avoid an unnecessary constitutional decision if possible, the district court examined the statutory claim first and enjoined the enforcement of the New York regulation on the ground that it conflicted with the federal regulations under the Social Security Act. On appeal, the court of appeals reversed the district court on the ground that the failure to present a substantial constitutional claim prevented the court from having jurisdiction over the statutory claim. After granting certiorari to consider the jurisdictional question, the Supreme Court held that the plaintiffs had presented a substantial constitutional claim, for purposes of federal jurisdiction, and that therefore the district court had jurisdiction to decide the statutory claim.

In *Hagans* the Supreme Court began by acknowledging the principle that a "substantial" federal question is necessary to support federal jurisdiction. "Over the years this Court has repeatedly held that the federal courts are without power to entertain claims otherwise within their jurisdiction if they are 'so attenuated and unsubstantial as to be absolutely devoid of merit,' . . . 'wholly insubstantial,' . . . 'obviously frivolous,' . . . 'plainly unsubstantial,' . . . or 'no longer open to discussion.'" 415 U.S. at 536–37, 94 S.Ct. at 1378–79 (citations omitted). However, the Court reversed the holding of the court of appeals, because, "[a]s was the case in *Bell v. Hood* [327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939], we cannot 'say that the cause of action alleged is so patently without merit as to justify . . . the court's dismissal for want of jurisdiction.' . . . Nor can we say that petitioners' claim is 'so insubstantial, implausible, foreclosed by prior decisions of this Court or otherwise completely devoid of merit as not to involve a federal contro-

versy within the jurisdiction of the District Court, whatever may be the ultimate resolution of the federal issues on the merits.'" *Id.* at 542–43, 94 S.Ct. at 1382 (citations omitted).

In light of the *Hagans* test, we are convinced that the plaintiffs' Equal Protection claim in their original complaint was a substantial constitutional claim sufficient to support the district court's exercise of pendent jurisdiction over the related statutory attack on the disability requirements. Texas's decision to deny AFDC benefits to needy children whose fathers' partial incapacity prevented them from obtaining an income sufficient to support their children, despite their being "capable of light work," is unquestionably not "so patently rational as to require no meaningful consideration." *Hagans v. Lavine*, 415 U.S. at 541, 94 S.Ct. at 1381. We therefore hold that the plaintiffs' original complaint presented a substantial constitutional question for purposes of permitting consideration by the federal district court of related pendent claims. *See, e. g., Hagans v. Lavine, supra; Rosado v. Wyman*, 397 U.S. 397, 90 S.Ct. 1207, 25 L.Ed.2d 442 (1970).

(b) Were the Plaintiffs' Constitutional Claims No More Than Alleged Conflicts Between State and Federal Law?

[4] The defendants contend that the plaintiffs can only claim that they have a right to AFDC benefits (even though they are "capable of light work" and even though their disability is expected to last for more than thirty days but less than sixty) by relying on rights originating from federal regulations. The defendants thus argue that the court had no jurisdiction over the plaintiffs' Equal Protection claims because these claims, allegedly based solely on rights arising from federal regulations, are in fact nothing more than claims that the Texas "capable of light work" and sixty-day eligibility requirements are in conflict with federal law. The defendants' analysis, however, evidences a misunderstanding of the nature of the protection afforded by the Equal Protection Clause of the Fourteenth Amendment. This "origin of the right" theory might be helpful in determining whether plaintiffs have been deprived of a "property" right without due process of law, but it has no rel-

evance to the analysis of the plaintiffs' Equal Protection claims.

[5, 6] A state violates the Equal Protection Clause when it irrationally treats differently those similarly situated or when it irrationally treats similarly those people situated differently. *See, e. g., Hagans*, 415 U.S. at 538–39, 94 S.Ct. at 1380–81. *See generally* J. Nowak, R. Rotunda & J. Young, Constitutional Law 519–22 (1978). Aside from determining the level of scrutiny to be applied, *id.* at 522–27, there is no issue in an Equal Protection claim concerning the right of anyone to anything other than similar treatment of similar individuals. For purposes of Equal Protection, it is immaterial whether anyone had a federal right to AFDC benefits despite being "capable of light work" and despite having a disability with an anticipated duration of less than sixty days but more than thirty; the only issue is whether the state of Texas had a rational basis for its different treatment of those persons arguably similarly situated. Consequently, neither of the plaintiffs' Equal Protection claims was based on a conflict between state and federal law.[6]

[7] We recognize that, as the defendants argue, the *Hagans* test may sometimes allow a plaintiff to sue in federal court on a claim that is stronger statutorily than constitutionally. The use of pendent jurisdiction in these cases may thus allow the federal courts to decide a statutory question instead of a constitutional one. However, we view *Hagans* and *Rosado* as permitting the federal courts in such instances to have the discretion to hear a pendent statutory question involving federal law and federal policy, rather than perforce to dismiss the claim and relegate it to a state forum.

[8] In *Hagans* the Court said, "In none of these cases did the Court think that with jurisdiction fairly established, a federal court under *Gibbs*, must nevertheless decide the

6. We do not dispute that the plaintiffs may have obtained some of their ideas about rationality from the approach taken by federal law. However, this does not deprive them of the right to try to prove that Texas law irrationally treats persons unequally.

constitutional issue and avoid the statutory claim if, upon weighing the two claims, the statutory claim is strong and the constitutional claim weak. On the contrary, Mr. Justice Harlan, writing for the Court in *Rosado v. Wyman*, and with the principles of *Gibbs* well in mind, noted that the pendent statutory question was essentially one of federal policy and that the argument for the exercise of pendent jurisdiction was 'particularly strong.'" *Hagans v. Lavine*, 415 U.S. at 549–50, 94 S.Ct. at 1385 (citations omitted). We do not interpret *Chapman* as modifying either the principle of pendent jurisdiction or the principle that a federal court has jurisdiction unless a constitutional claim is wholly unsubstantial.

II.

The defendants argue that even if the trial court had jurisdiction, the court lost jurisdiction when the challenge to the "capable of light work" requirement became moot. Furthermore, the defendants argue that since the plaintiffs had not been denied benefits as a result of the sixty-day eligibility requirement, they did not have standing to represent the class attack on said requirement.

(a) Did the Mootness of the Original Constitutional Claim Require a Dismissal of the Remaining Substantive Claim for Lack of Jurisdiction?

The plaintiffs' attack on the constitutionality of the Texas "capable of light work" requirement presented a substantial constitutional question, but, as noted previously, the revision of the Texas AFDC Handbook mooted the plaintiffs' attack on this requirement. By December 19, 1978, the date of the partial summary judgment for the plaintiffs, the only substantive attack that was not moot was the attack on the sixty-day eligibility requirement. We must consider whether the mootness of the plaintiffs' original constitutional claim deprived the court of all discretion as to whether to exercise jurisdiction over the remaining claim.

[9] The fact that a substantial constitutional claim becomes moot during the litigation does not deprive the court

of pendent jurisdiction over a related statutory claim. *Rosado v. Wyman*, 397 U.S. 397, 90 S.Ct. 1207, 25 L.Ed.2d 442 (1970). In *Rosado* the plaintiffs' Equal Protection attack against a New York AFDC regulation was rendered moot by an amendment to the regulation. However, after the three-judge court remanded to the single district judge, the district judge held that the regulation conflicted with the federal provisions, and he enjoined the use of the New York regulation. The court of appeals reversed this ruling; the district court was held to have lost jurisdiction to decide the statutory claim when the constitutional claim was rendered moot.

The Supreme Court granted certiorari and reversed the court of appeals on the ground that the district judge had properly exercised his discretion by proceeding to the merits. "We are not willing to defeat the commonsense policy of pendent jurisdiction—the conservation of judicial energy and the avoidance of multiplicity of litigation—by a conceptual approach that would require jurisdiction over the primary claim at all stages as a prerequisite to resolution of the pendent claim." 397 U.S. at 405, 90 S.Ct. at 1214 (footnote omitted).

In *Rosado*, the mooted constitutional claim concerned the identical statutory provision attacked on both constitutional and pended Supremacy Clause grounds. Here, distinguishably, the pended claim presently before us involves an attack on another facet of the disability standard that is very closely related to the mooted constitutional and statutory attack on the "capable of light work" facet. Both facets of the standard were attacked on Equal Protection grounds, as irrationally creating two classes of needy children. Both were likewise attacked on Supremacy Clause grounds, as inconsistent with federal regulation. There was a sufficient common nucleus of operative fact between the constitutional challenge to the light work requirement (as well as to the sixty-day eligibility requirement) on Equal Protection grounds and the pended Supremacy Clause attacks on the two facets of the disability standard. Either or both of these disability tests might apply to a welfare

claimant so as either to prevent initial eligibility or else to terminate benefits once commenced.

Pendent jurisdiction exists, under the *Gibbs* test, when the jurisdictional and the pendent claim "derive from a common nucleus of operative fact" and the plaintiffs' claims, if considered without regard to their jurisdictional character, "are such that he would ordinarily be expected to try them all in one judicial proceeding." 383 U.S. at 725, 86 S.Ct. at 1138. The constitutional claims relating to the invalidity of the light work requirement and to the invalidity of the sixty-day duration requirement as a basis for denying or terminating AFDC benefits, and the statutory claims (based on the Supremacy Clause) relating to the invalidity of these same two facets, were (to mix a metaphor) four intertwined strands of the same ball of wax. Further, as noted by *Hagans* (concerning similar constitutional and pended Supremacy Clause attacks on a state's AFDC regulation), another consideration militates against relegating the pendent claim to state court litigation: "[W]here the pendent claim is *federal* but is itself beyond the jurisdiction of the District Court . . .[,] the federal court's rendition of federal law will be at least as surefooted and lasting as any judgment from the state courts." 415 U.S. at 550, 94 S.Ct. at 1385 (emphasis in original).

[10, 11] Accordingly, the mootness of the original constitutional claim did not deprive the judge of all discretion as to whether to exercise jurisdiction over the pendent claim and proceed to the merits.[7] *See Rosado v. Wyman*, 397 U.S. at 401, 90 S.Ct. at 1212.

(b) Did the Judge Properly Exercise His Discretion by Proceeding to the Merits After the "Capable of Light Work" Challenge Had Become Moot?

[12] Although the decision to exercise pendent jurisdiction over the statutory attack on the sixty-day eligibility requirement was discretionary, under the peculiar facts of

7. Our finding that the judge had discretion does not necessarily mean that this discretion was properly exercised. See Part II(b), *infra*.

this case, we are convinced that the judge should not have proceeded to the merits. In view of the combination of standing *and* mootness problems created by the mooting of the "capable of light work" challenge *prior to certification of the class*, the judge should not have exercised jurisdiction over the sixty-day eligibility challenge without the presence of a named plaintiff who had been directly injured by the challenged requirement.

Initially, the plaintiffs unquestionably had standing to attack the "capable of light work" standard; each plaintiff had been denied AFDC benefits when they were found to be "capable of light work." They attacked the disability standard as invalid in its entirety, however, and they sought to represent all persons who had been injured by this standard. Although they had been directly injured by only one facet of the challenged standard, they were subject to the entire standard and attacked the standard as a whole. Given the facts of this case and the intertwined nature of the facets of the challenged standard, see Part II(a), *supra*, the plaintiffs' suit presented a "case or controversy" within the meaning of Article III.

Nevertheless, despite the plaintiffs' initial standing to challenge the disability standard in its entirety, once their attack on the "capable of light work" requirement became moot, the judge should have reconsidered whether the named plaintiffs were still appropriate representatives of the class. The judge should have considered dividing the class into sub-classes under Rule 23(c)(4), Fed.R.Civ.Proc.,[8] and allowing intervention by another named plaintiff if necessary.

Had the court found that there was no named plaintiff who could represent the sub-class challenging the sixty-day eligibility period, the court could have considered "whether it [was] in the interest of justice and judicial economy to

8. Rule 23(c)(4), Fed.R.Civ.Proc., provides, "When appropriate . . . a class may be divided into sub-classes and each sub-class treated as a class, and the provisions of this rule shall then be construed and applied accordingly."

postpone dismissal as to the subclass for a specified period in which members of the subclass could become plaintiffs by amendment of the Complaint or by intervention and thereby save the subclass action." *Johnson v. American Credit Company of Georgia*, 581 F.2d 526, 533 n.13 (5th Cir. 1978). *See Sullivan v. Winn-Dixie Greenville, Inc.*, 62 F.R.D. 370, 375–76 (D.S.C. 1974).[9]

[13] If the class had been properly certified before the "capable of light work" challenge become moot, the class action would not necessarily have become moot.[10] How-

9. In *Sullivan* the defendants objected to the class and argued that, if anything, there were discernible sub-classes. The district court agreed that the class was too broad, but it allowed sixty days for other individuals to intervene to represent the sub-class that the named plaintiffs were found inadequate to represent. *Cf.* Class Action-Mootness of Claim, 33 A.L.R.Fed. 484, 519–20 (1977), discussing cases that have allowed other class members to intervene when the named plaintiff's claim became moot.

10. In particular types of class actions [the Supreme Court] has held that the presence of a properly certified class may provide an added dimension to [the] Art[icle] III analysis, and that the mootness of the named plaintiffs' claims does not "inexorably" require dismissal of the action.

Kremens v. Bartley, 431 U.S. 119, 129–30, 97 S.Ct. 1709, 1715, 52 L.Ed.2d 184 (1977), citing *Sosna v. Iowa*, 419 U.S. 393, 399–401, 95 S.Ct. 553, 557–58, 42 L.Ed.2d 532 (1975), and also citing *Franks v. Bowman Transportation Co., Inc.*, 424 U.S. 747, 752–57, 96 S.Ct. 1251, 1258–60, 47 L.Ed.2d 444 (1976), and *Gerstein v. Pugh*, 420 U.S. 103, 110–11 n.11, 95 S.Ct. 854, 861 n.11, 43 L.Ed.2d 54 (1975).

Kremens distinguished these prior cases and remanded for substitution of class representatives with live claims; the intervening legislation that had mooted the named plaintiffs' claims had left the class so extremely fragmented "that the claims of the unnamed class members [were] not properly presented for review." 431 U.S. at 127, 97 S.Ct. at 1714. Although there are many similarities between the instant case and *Kremens*, there are also several differences. (For example, although one whole portion of the class action in the instant case was mooted by a revision of the regulations, the remaining claims were not fragmented and the challenge to the sixty-day requirement was arguably one that was "capable of repetition, yet evading review." *See Kremens v. Bartley, supra*, 431 U.S. at 133, 97 S.Ct. at 1717). Consequently, although the combination of the questions concerning both standing *and* mootness in the instant case requires us to remand, we

ever, no class certification hearing had as yet been held.[11] Furthermore, no such hearing was held until after every other issue in this litigation had been settled.[12]

Once the "capable of light work" challenge became moot and put the named plaintiffs' standing in question, the plaintiffs and the judge should have realized that intervention by another named plaintiff was appropriate. Nevertheless, it was the defendants' conduct that was largely responsible for this case being treated, without question, as a class action up until the very final moments. See note 12, *supra*. If the defendants had raised their objections to certification at the appropriate time, it would have been an easy matter for the judge to allow some time for another

note that were the problem one of mootness only, the rationale of *Kremens* might require a different result.

11. Under Rule 23(c)(1), Fed.R.Civ.Proc., "[a]s soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained." However, although the plaintiffs immediately moved for class certification, their motion was held in abeyance, apparently pending settlement negotiations. See Appendix (*History of the Litigation*). Eventually, plaintiffs again moved for certification of the class, but the "capable of light work" challenge became moot soon thereafter. Nevertheless, even after this challenge had become moot it might have been possible to salvage this litigation had it not been for the questionable conduct of the defendants. See note 12, *infra*. For a discussion of the problems created by the failure to immediately hold a certification hearing, see *Satterwhite v. City of Greenville*, 578 F.2d 987, 998–99 (5th Cir. 1978) (en banc), *vacated and remanded*,—U.S.—, 100 S.Ct. 1334, 63 L.Ed.2d 773 (1980).

12. As can be seen from the Appendix (*History of the Litigation*), the defendants made no objection to certification of the class until almost three and one-half years after suit was filed and almost one year after the "capable of light work" challenge became moot. In fact, after this challenge had become moot and the plaintiffs had again moved for certification, the defendants responded: "Assuming Plaintiff[s'] Class Certification Motion is in proper order, Defendants have no objection to such certification, following an appropriate brief hearing before the Court." Although this statement was somewhat equivocal, it certainly did not alert either the plaintiffs or the judge to the possibility that the defendants would vigorously oppose certification almost one year later.

named plaintiff to intervene. *See Johnson v. American Credit Company of Georgia*, *supra*, 581 F.2d at 533 n.13.

This case must be remanded so that an appropriate named plaintiff may intervene. We do so reluctantly, in view of the defendants' culpability, see note 12, *supra*, but the peculiar circumstances of this case have convinced us that the judge exceeded his discretion by proceeding to the merits of the sixty-day challenge without the presence of a named plaintiff who had suffered direct injury from the application of that specific facet of the Texas disability standard.

III.

The final issue in this case concerns the expense involved in preparing and mailing the proposed explanatory notice to the class. According to defendants' counsel, defendants intend to mail this notice by the end of July, 1980.

The description of the class as certified by the district court essentially tracked the description that had been proposed by plaintiffs throughout the litigation, and it conformed to the class description that had been approved by all parties on June 28, 1979. In the district court's final judgment on July 3, 1979, the class was certified and described as follows:

> All Texas residents who on or after October 3, 1976, for reasons of physical or mental incapacity are or were unable to support their minor children, and who have received, or are receiving, or may receive monthly AFDC–I benefits and who have had benefits terminated or have had applications for AFDC–I benefits rejected as a result of having their claims evaluated under the improper disability standard of §§ 2830, 2832 and 2833 of the AFDC Handbook, Texas Department of Human Resources.

The district court also ordered the defendants to mail the following explanatory notice, which had also been approved by all parties on June 28, 1979:

> The United States District Court for the Southern District of Texas, Brownsville Division, has

> ruled that the disability standard under which your application or claim for AFDC–I benefits may have been evaluated, did not conform to federal standards. The Texas AFDC–I standard has now been changed. If you desire, you may file a new application for AFDC–I benefits. Your evaluation will be evaluated under the new standard. To file your application or to obtain further information, please contact your local office of the Texas Department of Human Resources.

The defendants now contend that since they objected to the cost of preparing and mailing this explanatory notice, the Eleventh Amendment immunizes them from being forced to incur such expense. We disagree.

[14] Preliminarily, we note that by virtue of our decision to remand this case and to vacate the judge's ruling that the sixty-day eligibility requirement is unconstitutional, the defendants are entitled not to send a notice to anyone who was injured by this facet of the Texas disability standard. However, the plaintiffs are still entitled to have an appropriate notice sent to all class members who have been denied benefits because they were capable of light work;[13]

13. Our brother TJOFLAT is concerned that the district judge assigned no reasons for his conclusion that it was appropriate to require the defendants to pay for an explanatory notice concerning the elimination of the "capable of light work" requirement. However, at the time, the district judge was ruling on the appropriateness of a notice to the entire class. It is only in view of our remand with respect to the sixty-day disability requirement that the defendants are entitled to a more limited notice. Nevertheless, it is appropriate to order a more narrow notice concerning only the "capable of light work" requirement, first requested in the plaintiffs' original petition. The plaintiffs' claim for a notice to the class was not mooted by the revision of the regulations, any more than a claim for pre-revision damages would have been. Furthermore, the defendants have never raised this issue. This case has been pending over four and one-half years, and, as the opinion points out, even those class action issues presently before us were injected belatedly; a remand for reasons would almost inevitably entail another appeal. In view of these circumstances, we act on the record as presented to us.

the plaintiffs have at all times remained proper representatives of this sub-class. Since the plaintiffs are entitled to this notice, we must rule on the defendants' objection to the cost involved.

In arguing that the Eleventh Amendment[14] prohibits a federal court from ordering a state to pay for an explanatory notice when the state objects to the cost of such notice, the defendants principally rely on the Supreme Court's qualification in *Quern v. Jordan*, 440 U.S. 332, 99 S.Ct. 1139, 59 L.Ed.2d 358 (1979), that the defendants had not objected to the cost of a similar explanatory notice. In addition, defendants rely on a similar caveat in *Hutto v. Finney*, 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978), to the effect that there had been no objection by the defendants that the award of attorney's fees was "so large or unexpected that it interfered with the State's budgeting process." 98 S.Ct. at 2574 n.18. We think that the defendants misunderstand the import of these caveats, and, in any event, the defendants failed to present an adequate factual basis for their objection.

[15, 16] In *Quern v. Jordan*, the Seventh Circuit Court of Appeals authorized an explanatory notice to class members that was very similar to that ordered in the present case. At issue in *Quern* was whether "the modified notice contemplated by the Seventh Circuit constitute[d] permissible prospective relief or a 'retroactive award which requires the payment of funds from the state treasury.'" 99 S.Ct. at 1147–48. The Court answered the question by saying:

> We think this relief falls on the *Ex parte Young* [209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714] side of the Eleventh Amendment line rather than on the *Edelman* [*v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347,

14. The Eleventh Amendment states:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

> 39 L.Ed.2d 662] side. . . .
>
> The notice approved by the Court of Appeals, unlike that ordered by the District Court, is more properly viewed as ancillary to the prospective relief already ordered by the court. See *Milliken v. Bradley*, 433 U.S. [267] at 290, 97 S.Ct. [2749] at 2762 [53 L.Ed.2d 745]. The notice in effect simply informs class members that their federal suit is at an end, that the federal court can provide them with no further relief, and that there are existing state administrative remedies which they may wish to pursue. 99 S.Ct. at 1148, 1149.

Quern makes it clear that the type of notice ordered in the instant case is only ancillary relief. Therefore, the only issue is whether the defendants' objection to the cost of the notice is sufficient to distinguish this case from *Quern*.

The defendants rely on the following statements in *Quern*: "Petitioners make no issue of the incidental administrative expense connected with preparing and mailing the notice," 99 S.Ct. at 1148; and in *Hutto v. Finney*: "The Attorney General has not argued that this award was so large or so unexpected that it interfered with the State's budgeting process. Although the Eleventh Amendment does not prohibit attorney's fees awards for bad faith, it may counsel moderation in determining the size of the award or in giving the State time to adjust its budget before paying the full amount of the fee," 98 S.Ct. at 2574 n.18. The defendants argue on appeal that the cost of the notice in the instant case would be almost $80,000, and they thus argue that *Quern* and *Hutto* do not authorize the district court to make them pay for the notice.

An examination of one of the cases cited in both these opinions will illustrate that the amount of the cost of the notice is not dispositive. In *Quern* the Court cited *Milliken v. Bradley*, 433 U.S. 267, 97 S.Ct. 2749, 53 L.Ed.2d 745 (1977), in connection with its determination that the explanatory notice in *Quern* was only "ancillary to the prospective relief already ordered by the district court." In *Milliken* the petitioners had argued that "the requirement that the state defendants pay one-half the additional costs

attributable to the four educational components is, 'in practical effect, indistinguishable from an award of money damages against the state based upon the asserted prior misconduct of state officials.'" 433 U.S. at 288–89, 97 S.Ct. at 2761. However, the Court responded:

> The decree to share the future costs of educational components in this case fits squarely within the prospective-compliance exception reaffirmed by *Edelman*. That exception, which had its genesis in *Ex parte Young*, permits federal courts to enjoin state officials to conform their conduct to requirements of federal law, *notwithstanding a direct and substantial impact on the state treasury*. Id. at 289, 97 S.Ct. at 2762 (citations omitted) (emphasis added).

The Court also referred to *Milliken* in *Hutto v. Finney*. "'Ancillary' costs may be very large indeed. Last Term, for example, this Court rejected an Eleventh Amendment defense and approved an injunction ordering a State to pay almost $6 million to help defray the costs of desegregating the Detroit school system. *Milliken v. Bradley*, 433 U.S. 267, 293, 97 S.Ct. 2749, 2763, 53 L.Ed.2d 745 (Powell, J., dissenting)." *Hutto v. Finney*, 98 S.Ct. at 2573–74 n.15. The Court's citation of *Milliken* in both *Quern* and *Hutto* illustrates that it is the character of an expense, whether "ancillary" or not, rather than the amount, that is determinative as to whether there is an Eleventh Amendment issue.[15]

15. Even if cost were a relevant factor, there has been no indication by the defendants that the cost of the notice will, in the words of *Hutto*, interfere with "the State's budgeting process," 98 S.Ct. at 2574 n.18, except for an unsupported assertion in the defendants' brief that "payment for class notice from the budget of the Texas Department of Human Resources would add an additional burden to an administrative agency struggling to cope with the demands of needy welfare recipients." Defendants-Appellants' Brief at 16. Pretermitting for the moment the defendants' lack of proof of any significantly detrimental impact on either the budget of Texas as a whole or the budget of the Texas Department of Human Resources, we note that *Hutto* speaks of an impact on a state's budget, not the budget of a single administrative agency.

Quern, *Hutto*, and *Milliken* indicate that the defendants in this case can be required to pay for the notice to this class. The notice to this class is well within the prospective-compliance exception referred to in *Milliken*, and the bald assertion that it will cost too much is insufficient to invoke the proscriptions of the Eleventh Amendment.

We have been informed by defendants' counsel that the original proposed notice to the class was to be mailed by the end of July 1980.[16] Since the defendants now have the right to modify the proposed notice, the district court may allow the defendants until September 30, 1980 to have a revised notice, concerning only the "capable of light work" requirement, sent to the members of the class. If by that time no decision has been reached concerning the unconstitutionality of the sixty-day eligibility requirement, then the revised notice must be sent. A second notice, concerning the sixty-day requirement, may be sent later if necessary.

In view of the possibility of a second explanatory notice, we will address the defendants' contention that the difficulties involved in notifying the class members outweigh any benefits that the class members might receive. This argument is premised on the contention that no one who was denied benefits under the sixty-day eligibility requirement is now likely to be able to qualify under the thirty-day eligibility requirement. We find this argument to be utterly without merit. If the defendants had timely raised their objections to certification, then these objections could have been resolved by allowing another named plaintiff to intervene. If that had happened, then a single notice, as originally anticipated, could now be mailed, not only to those denied benefits under the sixty-day eligibility requirement, but also to those denied benefits because they were "capable of light work." Numbers of these latter persons would presumably be able to qualify under the new incapacity

16. We have not been informed as to why the notice was not mailed sooner in view of the fact that the defendants' motion for a stay pending appeal was denied by this court on November 1, 1979.

standard.[17] The defendants' failure to object has necessitated a remand in this case, and they cannot now contend that they should be relieved of the possible obligation to notify those persons aggrieved by the sixty-day eligibility requirement as a result of their own questionable litigation tactics. See note 12, *supra*.

The defendants have contested this litigation at every stage over the past five years without ever raising any substantive defense to the plaintiffs' contention that the disability standard is both unconstitutional and inconsistent with federal law. We find no merit to their contentions that the Eleventh Amendment protects them from paying for an explanatory notice to the class or that the administrative costs of preparing and mailing such a notice outweigh the possible benefits to the class.

Conclusion

The district judge had jurisdiction, but once the challenge to the "capable of light work" requirement became moot, he should have created sub-classes and allowed time for the intervention of a named plaintiff with standing to represent the sub-class challenging the sixty-day eligibility requirement. Consequently, we vacate that portion of the judge's decision holding the sixty-day eligibility requirement unconstitutional and remand for further proceedings consistent with this opinion. We affirm that portion of the judge's ruling that requires the defendants to bear the expense of preparing and mailing an explanatory notice to the class, but we remand for a modification of this notice.

17. Although the revised disability definition has done away with the "capable of light work standard," the revised version did not go into effect until the latter part of 1978, and the notice was to be sent to all welfare applicants who have been denied benefits since October 3, 1976. Consequently, all applicants who were denied benefits between October of 1976 and the latter part of 1978 on the ground that they were "capable of light work" will receive notice that they can now reapply under the new standard.

In the event that the district court orders any additional notice concerning the sixty-day eligibility requirement, the defendants must bear the expense of preparing and mailing that notice as well.

AFFIRMED AND MODIFIED IN PART, AND VACATED AND REMANDED IN PART.

APPENDIX

History of the Litigation

On December 10, 1975, the plaintiffs filed their complaint and a motion for a preliminary injunction. Although there was some language in the complaint that generally attacked the Texas incapacity standard as being inconsistent with the Social Security Act, 42 U.S.C. §§ 601 *et seq.*, and as being in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment, there were basically two specific contentions: 1) that the incapacity standard of sections 2832 and 2833 of the Texas AFDC Handbook, Texas Department of Public Welfare, conflicted with the Social Security Act (and the regulations thereunder) and violated Due Process and Equal Protection because these sections required an applicant to be incapable "of light work"; and 2) that the failure to provide an adequate hearing when either rejecting or terminating applications also conflicted with the Social Security Act (and the regulations thereunder) and violated the Due Process Clause of the Fourteenth Amendment. In their complaint, both plaintiffs alleged that they had had AFDC benefits denied or terminated because they had been found to be "capable of light work." The complaint alleged that the plaintiffs represented the class of people who had been improperly denied benefits under the illegal standard, and jurisdiction was said to be based, *inter alia*,[1] on 42 U.S.C. § 1983 and 28 U.S.C. § 1343.

During the two and one-half years following the filing of the complaint, the litigation failed to move forward. The defendants filed an answer and the plaintiffs filed a motion to have the action declared a class action, but on August 23, 1976, all motions were held in abeyance by consent of all parties pending settlement negotiations. The deadline for the agreement to hold everything in abeyance, December 1, 1976, came and went, and the court heard nothing from the parties. On Sep-

1. The complaint also alleged jurisdiction under 28 U.S.C. §§ 1331 (general federal question) and 1337 (laws regulating trade or commerce), but the plaintiffs no longer contend that these statutes provided the court with jurisdiction.

tember 26, 1977, the court ordered the plaintiffs to inform it of the status of the case or else the case would be dismissed for want of prosecution. When no response was received, the court dismissed the case without prejudice, but the plaintiffs filed a motion to reinstate the case, and on January 30, 1978, the case was reinstated.

Once the case was reinstated, the litigation began to move more rapidly. On May 1, 1978, the plaintiffs filed an amended motion for preliminary injunction and a motion for summary judgment. In the amended motion for a preliminary injunction, the plaintiffs directly attacked the Texas standard of eligibility as a whole. Along with challenging the "capable of light work" standard, this amended motion also attacked the Texas requirement that in order for an applicant to be eligible for benefits, the incapacity must be expected to last for two months. This requirement was attacked as being in direct conflict with the Social Security regulation that only required the incapacity to last thirty days, 45 C.F.R. §§ 233.90(b)(6) and (c)(l)(iv). In the motion for summary judgment, the plaintiffs renewed their attack on the "capable of light work" standard, and they also requested the court to rule that the two month incapacity requirement was in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment as well as in conflict with the Social Security Act (and its accompanying regulations). The request that their action be maintained as a class action was also renewed.

On May 11, 1978, the plaintiffs filed a memorandum in support of their motion for summary judgment. In this memorandum they primarily argued that the Texas regulations were inconsistent with the Social Security Act (and the pertinent regulations) and, therefore, that the Texas regulations violated the Supremacy Clause of the United States Constitution. On the same day that this memorandum was filed, the parties filed certain stipulations that acknowledged the anticipated revision of the Texas AFDC Handbook and the fact that this revision would satisfy all but one of the plaintiffs' objections. Therefore, the only substantive issue remaining for the court to decide was whether either the two month standard of section 2832 or the sixty-day standard of the proposed revised section 2830 was in conflict with the Social Security Act or its regulations.

On May 26, 1978, the defendants filed their opposition to the plaintiffs' motions for summary judgment and preliminary injunction. The defendants stated that the only issue left was whether Texas' sixty-day eligibility period was invalid, and they filed a motion to stay the proceedings based on their desire to pursue conformity proceedings with the Department of Health, Education and Welfare. The defendants also stated, "Assuming Plaintiff[s'] Class Certification Motion is in proper order, Defendants have no objection to such certification, following an appropriate brief hearing before the Court." On July 5, 1978, the plaintiffs filed an opposition to the motion to stay in which they ar-

gued that several of their claims were not moot because the issues of injunctive relief and retroactive benefits remained viable along with their attack on the sixty-day eligibility standard.

On December 19, 1978, three years after suit had been filed, the trial judge granted partial summary judgment for the plaintiffs. The plaintiffs' request for retroactive benefits was denied, but the court held that the sixty-day standard was inconsistent with the Social Security Act (and its regulations) and enjoined Texas from using the invalid standard. The trial judge denied the defendants' motion to stay, but he deferred his ruling on, *inter alia*, the existence of a class.

Following an unopposed motion for continuance by the defendants, an oral hearing on all pending motions was scheduled for April 26, 1979. At this hearing, the defendants for the first time filed a motion to dismiss the case for lack of jurisdiction. The defendants contended that 42 U.S.C. § 1983 and 28 U.S.C. § 1343 were an insufficient basis for jurisdiction where the only substantial claim was that a state law was inconsistent with a federal law and therefore was invalid under the Supremacy Clause. The defendants pointed out that the Supreme Court had just heard argument on the precise point, but the trial court denied the motion to dismiss.

With respect to class certification, the defendants for the first time objected that the plaintiffs were not adequate representatives of the class because they had not been denied benefits because of the sixty-day eligibility period but rather because they were "capable of light work." However, the judge felt that this argument lacked merit, and he certified the case as a class action. With respect to notice to the class, the court ordered the defendants to send out an explanatory notice consistent with *Quern v. Jordan*, 440 U.S. 332, 99 S.Ct. 1139, 59 L.Ed.2d 358 (1979), but the defendants objected for the first time to the cost of preparing and mailing such a notice. Defense counsel stated that she expected to receive information on how many people the defendants would be able to notify and on how much it would cost, and the court set a hearing for June 22, 1979 to determine the wording of the description of the class, the number of people in the class, and the wording and cost of an explanatory notice.

On June 1, 1979, plaintiffs filed a proposed class description for class certification and a proposed notice. On the same day, defendants filed a motion for a rehearing on their motion to dismiss on the basis of the Supreme Court's decision in *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 99 S.Ct. 1905, 60 L.Ed.2d 508 (1979). The court agreed to hear the defendants' motion for rehearing at the upcoming hearing.

On June 22, 1979, more than three and one-half years after the filing of the complaint, the final hearing in this case was held. After extensive argument concerning the effect of *Chapman v. Houston Welfare Rights Organization* on the motion to dismiss for lack of jurisdiction,

the trial judge ruled that *Chapman* did not mean that he was deprived of jurisdiction. He stated that he would write a supplemental memorandum opinion fully outlining his reasoning. Further, at a conference in the judge's chambers, the parties apparently agreed on the notice that was to be sent to the class, and the judge ordered them to submit the agreed-upon notice to the court as soon as possible.

On June 28, 1979, the parties submitted a class description and a proposed notice that had been agreed upon by both sides. On July 3, 1979, this class description and notice were incorporated in the trial court's final judgment. On the same day, the judge filed a memorandum opinion explaining that the motion to dismiss would be denied because *Chapman* had not overruled the principle that a purely statutory claim could be pended to a substantial constitutional claim. Since the trial judge felt that the plaintiffs' constitutional claims had been substantial, he held that he had pendent jurisdiction to decide the statutory claims, despite the fact that some of the constitutional claims had become moot during the pendency of the litigation.

TJOFLAT, Circuit Judge, concurring and dissenting:

The majority opinion struggles valiantly to make sense out of a muddled record of proceedings in the district court. I agree with the majority that the challenge to the "capable of light work" requirement is moot and that the case must be remanded to the district court "so that an appropriate named plaintiff may intervene," *ante* at page 650, to pursue the attack on the sixty-day disability standard. If a plaintiff with proper standing should appear, the district court will then have the task of reassessing its jurisdiction. The court may properly find that it has jurisdiction pendent to its jurisdiction over the now moot challenge to the "capable of light work" standard only if the new plaintiff can show that his claims and the claims that have been mooted derive from a "common nucleus of operative fact." Of course, it will also be open to the new named plaintiff to argue that equal protection and due process objections to the sixty-day disability standard are sufficiently substantial to give the court pendent jurisdiction to entertain the claim that the disability standard offends the supremacy clause.[1]

1. The majority mentions the equal protection and due process challenges to the sixty day disability standard, *ante* at page 648 and 654, but apparently assumes that these claims were not "substantial." It

I cannot concur with the majority's approval of the district court's order requiring the defendants to bear the expense of preparing and mailing the explanatory notice to all class plaintiffs who have been denied AFDC benefits under the "capable of light work" standard. Ordinarily, a court has no power to grant relief, even equitable relief, once the claim for relief has become moot. The obvious reason is that an order granting relief may only follow a determination of liability; there can be no such determination where the claim is mooted.

Rule 23 of the Federal Rules of Civil Procedure gives a court extraordinary powers that may sometimes qualify the general rule, however. Rule 23(d)(2) provides that a court conducting a class action may make "appropriate orders . . . requiring for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action . . ." Arguably, this rule empowered the district court to order the defendants to bear the expense of the explanatory notice concerning the elimination of the "capable of light work" standard. The court's discretion under the rule is limited by the requirement that the order be "appropriate." For meaningful appellate review of an exercise of discretion pursuant to the rule to be possible, the district court must explain why it has found such action "appropriate." Moreover, the explanation must be based on findings of fact. Since the district court did not explain the basis of its order in the present case, the order should be reversed and remanded to give the court an opportunity to do so.

does not appear, however, that the district court ever ruled on the substantiality of the claims. The court should consider itself free to do so on remand.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

DELFINO SILVA and JOSE MIRANDA, JR., individually and on behalf of all others similarly situated

CIVIL ACTION NUMBER

vs.

RAYMOND W. VOWELL, individually and in his capacity as Commissioner of the Texas Department of Public Welfare, and the STATE DEPARTMENT OF PUBLIC WELFARE

75-B-224

FINAL JUDGMENT

In accordance with the Memorandum and Order of December 19, 1978, the Memorandum entered this same date, and the Court's rulings at the oral hearings conducted on April 26, 1979, and June 22, 1979, it is hereby

ORDERED, ADJUDGED AND DECREED that the Defendants' Motion to Dismiss is in all respects DENIED.

It is further ORDERED, ADJUDGED AND DECREED that the Plaintiffs' class as delineated below is certified as a class action under Fed. R. Civ. P. 23(b)(2). The class shall be described as follows:

> All Texas residents who on or after October 3, 1976, for reasons of physical or mental incapacity are or were unable to support their minor children, and who have received, are receiving, or may receive monthly AFDC–I benefits and who have had benefits terminated or have had applications for AFDC–I benefits rejected as a result of having their claims evaluated under the improper disability standard of §§ 2830, 2832 and 2833 of the AFDC Handbook, Texas Department of Human Resources.

It is further ORDERED, ADJUDGED AND DECREED that the Defendants shall mail notice at the Defendants' expense to members of the above certified class in the fol-

lowing manner:

> The United States District Court for the Southern District of Texas, Brownsville Division, has ruled that the disability standard under which your application or claim for AFDC–I benefits may have been evaluated, did not conform to federal standards. The Texas AFDC–I disability standard has now been changed. If you desire, you may file a new application for AFDC–I benefits. Your application will be evaluated under the new standard. To file your application or to obtain further information, please contact your local Office of the Texas Department of Human Resources.

It is further ORDERED, ADJUDGED AND DECREED that the Defendants' regulation concerning the 60 day waiting period on expected minimum incapacitation as found in § 2830 of the Texas AFDC Handbook is in conflict with the corresponding 30 day waiting period in 45 C.F.R. § 233.90(c)(1)(iv).

It is further ORDERED, ADJUDGED AND DECREED that a permanent injunction shall immediately issue enjoining the Defendants from the use of the 60 day waiting period provided in § 2830 of the Texas AFDC Handbook and requiring the Defendants to conform the said regulation with the 30 day waiting period mandated by 45 C.F.R. § 233.90(c)(1)(iv).

It is further ORDERED, ADJUDGED AND DECREED that the Plaintiffs shall recover from the Defendants, the sum of $7500 as attorneys' fees.

It is further ORDERED, ADJUDGED AND DECREED that the costs in the abovestyled cause shall be assessed against the Defendants.

The Clerk shall remove the abovestyled cause from the docket of this Court.

The Clerk shall send a copy of this Final Judgment and the accompanying Memorandum to all counsel.

DONE at Brownsville, Texas, on this the 3rd day of July, 1979.

Reynaldo G. Garza
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

DELFINO SILVA and JOSE MIRANDA, JR., individually and on behalf of all others similarly situated

CIVIL ACTION NUMBER

vs.

RAYMOND W. VOWELL, individually and in his capacity as Commissioner of the Texas Department of Public Welfare, and the STATE DEPARTMENT OF PUBLIC WELFARE

75-B-224

Texas Rural Legal Aid, Inc. (Gerald A. Garcia) of Harlingen, Texas, for Plaintiffs.

Oficina Legal del Pueblo Unido (Jose Antonio Gomez) of San Juan, Texas, for Plaintiffs.

Honorable Mark White, Attorney General of Texas (Kathryn A. Reed, Assistant Attorney General) of Austin, Texas, for Defendants.

MEMORANDUM

This is a civil action brought against the Texas Department of Public Welfare and its Commissioner, originally contending that certain provisions of the Texas AFDC Handbook deprived the Plaintiffs, applicants and recipients of AFDC benefits, of their due process and equal protection guarantees under the Fourteenth Amendment. The Plaintiffs also alleged that those provisions conflicted with corresponding provisions found in the Social Security Act, 42 U.S.C. §§ 301–1397f, and the regulations promulgated thereto. This Memorandum supplements an earlier Memorandum and Order of December 19, 1978, in order to clarify the issue of the Court's jurisdiction in this case. The present action was initiated pursuant to 42 U.S.C. §§ 1983, and jurisdiction was alleged under 28 U.S.C. § 1331, 1337 and 1343.

A detailed recitation of the facts in this case may be found in the Court's previous Memorandum and Order. Basically, though, the Plaintiffs contended that the actions of the Defendants in terminating AFDC–I benefits and rejecting applications for such benefits under a standard of "capable of light work" were unconstitutional in that they deprived the Plaintiffs of due process and equal protection. The Plaintiffs also claimed that the actions of the Defendants in terminating benefits and rejecting applications without affording individuals an opportunity for a fair and adequate hearing amounted to a deprivation of due process. Finally, the Plaintiffs contended that the state regulations conflicted with their federal counterparts.

However, prior to the Court's consideration of the issues, the Defendant Texas Department of Public Welfare had amended its regulations, removing the constitutionally offensive provisions. The only issue which clearly remained for the Court's examination was the issue of the inconsistency with federal law. Specifically, there was a variance of thirty days between the Texas and federal regulations concerning the expected minimum incapacitation period of a parent with a dependent child. It was unclear at the time whether the Plaintiffs were still urging their attack upon the alleged lack of fair and adequate hearings.

In that Memorandum and Order, the Court rendered a decision as to the conflict in the regulations, ruling that the State must change its regulation to comport with federal law. Certain issues such as the maintenance of a class action and attorneys' fees were reserved for argument at a subsequent hearing. At a hearing held on April 26, 1979, the Defendants submitted a Motion to Dismiss based upon the ground that the Court lacked jurisdiction. The Court denied the Motion to Dismiss, certified the class and continued the hearing until June 22, 1979.

In the interim, the United States Supreme Court rendered its decision in *Chapman* v. *Houston Welfare Rights Organization*, 47 U.S.L.W. 4528 (May 15, 1979). Briefly, the Court in *Chapman* held that a federal court has no jurisdiction over a case brought by a welfare recipient which is predicated solely upon a conflict between state and fed-

eral regulations under the Supremacy Clause. *Id.* at 4532. The Court also held that such a plaintiff could not assert a claim under 42 U.S.C. § 1983 without a reference to a constitutional provision or a congressional act which provides for equal rights, as required by 28 U.S.C. § 1343(3), or civil rights, as mandated by 28 U.S.C. § 1343(4). *Id.* at 4533. The Court ruled that a reliance upon the Social Security Act as an avenue to jurisdiction under § 1343(3) or (4) is unfounded since that act provides for neither equal rights nor civil rights. *Id.* at 4534.

Based upon this decision, the Defendants in the instant case sought a rehearing on their Motion to Dismiss. The Court granted the Defendants Motion for Rehearing, and argument was heard at the hearing on June 22, 1979. The Defendants contended that the original constitutional claims had become moot, and, additionally, those claims had not been of sufficient constitutional substance. The Plaintiffs countered that their constitutional claims had been substantial and that the subsequent mootness was immaterial. The Plaintiffs also raised an equal protection argument that the thirty day difference between the state and federal regulations created two classes of citizens without a rational basis for the distinction.

In *Hagans* v. *Lavine*, 415 U.S. 528 (1974), recipients of AFDC benefits instituted a § 1983 action, alleging a violation of equal protection and a conflict between New York and federal AFDC regulations. The Court in *Hagans* held that 28 U.S.C. § 1343(3) does confer jurisdiction upon a federal district court if there is a constitutional claim of sufficient substance. *Id.* at 536. A district court may not entertain a claim which is wholly insubstantial, obviously frivolous or no longer open to discussion. *Id.* at 537. The Court also held that if the constitutional claim is of sufficient substance, a district court may hear the claim concerning the conflict between federal and state law as a matter of pendent jurisdiction. *Id.* at 536. The exercise of pendent jurisdiction is proper whenever the state and federal claims derive from "a common nucleus of operative fact." *United Mine Workers of America* v. *Gibbs*, 383 U.S. 715, 725 (1966). *See also Kimbrough* v. *Arkansas Activi-*

ties Association, 574 F.2d 423, 427 (5th Cir. 1978). Once a court has determined that a substantial constitutional claim has been alleged and that it has pendent jurisdiction over the statutory claim, it should deal first with the latter and not reach the former if the statutory claim is dispositive. *Hagans* v. *Lavine*, 415 U.S. at 546.

Additionally, if the district court has determined that a substantial constitutional claim was raised by the allegations in the complaint, it retains jurisdiction over the pendent claim even if the constitutional claim becomes moot. *See Rosado* v. *Wyman*, 397 U.S. 397, 405 (1970). The Court in *Rosado* stated that mootness is a factor in a district court's overall discretion in determining the pendent jurisdiction issue. *Id.* at 403. Nonetheless, the issue of mootness in no way affects a district court's power to hear the pendent claim. *Id.*

The decision in *Chapman* did not overrule or alter the decisions in *Hagans* or *Rosado*. In *Chapman*, no substantial constitutional claim had been raised. The Court in *Chapman* merely ruled that without such a substantial constitutional claim, federal jurisdiction is lacking when a complaint alleges only a violation of 42 U.S.C. § 1983 due to a conflict in federal and state regulations.

In the present case, the Court is of the opinion that the constitutional claims alleged in the Plaintiffs' Original Complaint were indeed of a substantial nature. They were not wholly insubstantial, obviously frivolous or no longer open to discussion. The Plaintiffs have stated a claim under 42 U.S.C. § 1983 for violations of equal protection and due process, and jurisdiction is extant pursuant to 28 U.S.C. § 1343.

Having determined that the allegations of the Complaint raised substantial constitutional claims, the Court has the power to hear the pendent claim provided that it and the constitutional claims derived from a common nucleus of operative fact. In the present case, it cannot reasonably be argued that the constitutional and the statutory claims were grounded upon the same challenges and were thoroughly interwoven. Since there were substantial constitu-

tional claims in the Complaint, their subsequent mootness becomes irrelevant. The Court retained jurisdiction to decide the pendent claim.

On December 19, 1978, the Court rendered a determination concerning the statutory claim in this case. Since the Complaint contained substantial constitutional claims and since the Court's ruling on the statutory ground was dispositive, there was at that time, and there is now, no reason to decide the federal constitutional issues. The Court must, therefore, reject the Defendants' argument concerning their Motion to Dismiss.

The Clerk shall send a copy of this Memorandum and the accompanying Final Judgment to all counsel.

DONE at Brownsville, Texas, on this the 3rd day of July, 1979.

Reynaldo G. Garza
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

DELFINO SILVA and JOSE MIRANDA, JR., individually and on behalf of all others similarly situated,

CIVIL ACTION NUMBER

vs.

RAYMOND W. VOWELL, individually and in his capacity as Commissioner of the Texas Department of Public Welfare, and THE STATE DEPARTMENT OF PUBLIC WELFARE

75-B-224

Texas Rural Legal Aid, Inc. (Gerald A. Garcia, of Brownsville, Texas and George Powell, of Edinburg, Texas) for the Plaintiffs.

Honorable John L. Hill, Attorney General of Texas (Frank C. Cooksey and C. J. Carl, Assistant Attorneys General) of Austin, Texas, for the Defendants.

MEMORANDUM AND ORDER

This is a civil action seeking declaratory and injunctive relief to enforce certain provisions of the Social Security Act of 1935, 49 Stat. 620, as amended, 42 U.S.C. §§ 301–1397f, and the regulations promulgated thereto. Specifically, the Plaintiffs contended in their Original Complaint that certain provisions of the Aid to Families with Dependent Children Handbook published by the Texas Department of Human Resources are in conflict with the corresponding provisions of the Social Security Act and the pursuant regulations. The Plaintiffs ground their suit upon 42 U.S.C. § 1983. Jurisdiction is alleged under 28 U.S.C. §§ 1331, 1337 and 1343. The Plaintiffs are attempting to litigate this action on their own behalfs and on behalf of all other persons similarly situated.

The present lawsuit, which began on December 10, 1975,

arose out of certain discrepancies between the state and federal Aid to Families with Dependent Children [AFDC] guidelines concerning the physical or mental incapacity of parents who are seeking aid for their dependent children. The Plaintiffs contended in their Original Complaint that the failure of the state to follow the federal guidelines and the Defendants' practice of denying applications or terminating benefits prior to a hearing amounted to a deprivation of due process while acting under color of state law. For reasons that will shortly be apparent, the Court need not discuss the great bulk of the Plaintiffs' original challenges.

Over eight months after the filing of the Complaint, the parties agreed that all motions could be held in abeyance until December 1, 1976. Due to the inactivity of both parties, however, this cause was dismissed without prejudice for want of prosecution on October 19, 1977. Upon motion by the Plaintiffs, this Court reinstated the case on January 30, 1978.

On May 1, 1978, the Plaintiffs filed an Amended Motion for Preliminary Injunction asking this Court to enjoin the Defendants from failing to implement state AFDC regulations which would comply with the federal requirements. On the same day, the Plaintiffs filed their Motion for Summary Judgment requesting this Court to declare that such Defendants' failure to comply be declared unconstitutional pursuant to the Due Process and Equal Protection Clauses and that the Defendants be enjoined from not complying with the federal regulations. The Plaintiffs renewed their request that the case be certified as a class action. The Plaintiffs further requested that they be awarded those AFDC benefits which were wrongfully denied them and, in addition, that they be awarded reasonable attorney's fees.

The Plaintiffs' supporting memorandum to the Motion for Summary Judgment was filed on May 11, 1978, in which the Plaintiffs claimed that the Defendants' guidelines were also unconstitutional under the Supremacy Clause. On the same date the parties filed stipulations detailing the substantive issues remaining for decision. Included in the stipulations were certain letters from the Department of

Health, Education and Welfare (HEW) and the number of people whose applications were denied or benefits terminated on the basis of lack of parental incapacity as defined by the state regulations.

On May 17, 1978, the Texas Board of Human Resources convened to consider a proposed revision to the state AFDC Handbook concerning the definition of incapacity and the procedure for such determination. This proposal was drafted in response to the instant litigation. On that date, the Board of Human Resources adopted the proposal, and it was subsequently filed with the Secretary of State of Texas. Section 2830 of the Revised Handbook which deals with the definition of physical or mental incapacity now complies with the corresponding federal regulation, 45 C.F.R. § 233.90 (c)(1)(iv), in all but one respect. This single conflict deals with the expected minimum duration period of the incapacity. All other challenges made by the Plaintiffs against the state AFDC guidelines have thus been rendered moot by the adoption of the revised Texas Handbook. As to the mooted contentions, the need to discuss them and render a decision thereupon is obviated.

On May 26, 1978, the Defendants filed their response in opposition to Plaintiffs' Motion for Summary Judgment and Plaintiffs' Amended Motion for Preliminary Injunction. The Defendants do not object to the certification of the class following an appropriate hearing. The Defendants ground their opposition upon the fact that the state's guidelines concerning the necessary waiting period to determine incapacity had existed for almost twenty years with consistent authorization and approval prior to written notification to the contrary by the regional office of HEW on January 20, 1978. The Defendants state that before receipt of the above letter, they had received letters of approval from HEW. Because of these circumstances, the Defendants, believing that all issues save for the time period discrepancy have been mooted, filed an accompanying Motion to Stay Proceedings to allow HEW to institute and conclude conformity proceedings pursuant to 45 C.F.R. §§ 201.4, 201.6 and 213. In the alternative, the Defendants request that the Secretary of HEW, Mr. Joseph Califano, be made a

defendant pursuant to Rule 19(a) or 20(a) of the Federal Rules of Civil Procedure or be allowed to intervene pursuant to Rule 24(a) or (b). Lastly, the Defendants request that, upon denial of their motions to stay or to join or to allow intervention of the Secretary of HEW, this Court seek an *amicus curiae* statement from HEW in order to clarify the issue of the expected duration period of the incapacity.

The Plaintiffs responded to the above pleadings on July 5, 1978. The Plaintiffs contend that the motions to stay and in the alternative to join or allow intervention should be denied since the Defendants have already been informed of HEW's position and the granting of said motion would result in an unnecessary delay. The Plaintiffs also contend that other issues do remain besides the thirty day–sixty day discrepancy. The Plaintiffs claim that this Court still needs to decide the appropriateness of an injunction to allow the Plaintiffs' cases to be reconsidered and the issues of retroactive payments and attorney's fees.

Based upon a consideration of the various pleadings filed in this cause, this Court is of the opinion that the Plaintiffs are entitled to a partial summary judgment concerning the interpretation of the state AFDC Guidelines and an accompanying permanent injunction enjoining the Defendants from operating under state guidelines which conflict with the latter's federal counterparts. Summary Judgment shall be denied as far as any award of retroactive payments is concerned. The Court will defer its ruling on the award of attorney's fees pending the submission of certain affidavits as specified in the accompanying Order. It is the further opinion of this Court that the Defendants' Motions to Stay Proceedings, to Join the Secretary of HEW and to Allow Intervention of the Secretary of HEW and the request to seek an *amicus curiae* statement from HEW should in all respects be denied. The resolution of the remaining issues, to wit, the existence *vel non* of a class, the necessity of the issuance of injunctive relief enjoining the Defendants from refusing to allow Plaintiffs to reapply and the issue of whether any Plaintiffs were denied their procedural due process

rights, can best be determined following an appropriate oral hearing before the Court.

I. CONFLICT BETWEEN STATE AND FEDERAL REGULATIONS

The only factual challenge remaining in this case revolves around the sixty day expected incapacitation period found in § 2830 of the Texas AFDC Revised Handbook and the correlative thirty day period found in 45 C.F.R. § 233.90(c)(1)(iv). Section 233.90(c)(1)(iv) reads as follows:

> **(c) Federal financial participation.**
>
> (1) Federal financial participation under title IV-A of the Social Security Act in payments with respect to a "dependent child," as defined in Section 406(a) of the Act, is available within the following interpretations:
>
> * * *
>
> (iv) *"Physical or mental incapacity."*
> "Physical or mental incapacity" of a parent shall be deemed to exist when one parent has a physical or mental defect, illness or impairment. The incapacity shall be supported by competent medical testimony and must be of such a debilitating nature as to reduce substantially or eliminate the parent's ability to support or care for the otherwise eligible child and be expected to last for a period of at least 30 days. In making the determination of ability to support, the agency shall take into account the limited employment opportunities of handicapped individuals.
>
> A finding of eligibility for OASDI or SSI benefits, based on disability or blindness is acceptable proof of incapacity for AFDC purposes.

The wording of § 2830 of the Texas AFDC Revised Handbook is identical with minor word changes except that the expected minimum duration of the incapacity is set at sixty days rather than thirty. The Plaintiffs contend that the federal regulations are controlling on this issue and that any conflict in wording between state and federal guidelines must result in the former complying with the latter. The Plaintiffs further contend that this conflict not only violates the Social Security Act but the Due Process, Equal Protection and Supremacy Clauses as well. The Defendants in response merely state that these guidelines have been used for nearly twenty years and had never faced any form of disapproval until the January 20, 1978 letter received from HEW.

The purpose of the AFDC program is to provide aid and services to needy families with dependent children. The AFDC program is financed largely by the federal government on a matching fund basis and is administered by the states. A state is under no obligation to participate in the program. If a state chooses to obtain the federal funds available for distribution to needy children, however, it is required to submit an AFDC plan for the approval of the Secretary of HEW. The plan must conform with several requirements of the Social Security Act and with the rules and regulations promulgated by HEW. *See King* v. *Smith*, 392 U.S. 309, 316–19 (1968).

Each state has wide latitude in allocating its AFDC resources. It is free to set its own criteria for measuring need and to determine a level of benefits by the amount of funds it directs to the program. *See Lopez* v. *Vowell*, 471 F. 2d 690, 693 (5th Cir. 1973), *cert. denied*, 411 U.S. 939 (1973). Nonetheless, a state which seeks to qualify for federal AFDC funding must operate a program which is not in conflict with the Social Security Act. *See Van Lare* v. *Hurley*, 421 U.S. 338, 340 (1975). The Act itself provides in § 602(a)(10) that "aid to families with dependent children shall . . . be furnished with reasonable promptness to all eligible individuals. . . ." The term "eligible individuals" connotates a federal standard of eligibility precluding a state from in-

truding upon that determination. *See Carleson* v. *Remillard*, 406 U.S. 598, 600 (1972); *Parks* v. *Harden*, 504 F.2d 861, 868 (5th Cir. 1974); *Lopez* v. *Vowell*, *supra*, at 693. The Supreme Court has held that a state may not deny aid to persons who come within that federal standard of eligibility in the absence of a clear indication that Congress meant the coverage to be optional. *See Philbrook* v. *Glodgett*, 421 U.S. 707, 719 (1975). No such indication is apparent in the present action.

In this case, the pertinent federal standard is not incorporated in the statute itself. The section dealing with physical and mental incapacity is found in the regulations promulgated by the HEW. This fact has no effect in the decision, however. The draftsmen of a congressional act can not possibly foresee every possible contingency that might arise. For this reason, Congress has provided the Secretary of HEW with the power to "make and publish such rules and regulations, not inconsistent with this chapter [the Social Security Act], as may be necessary to the efficient administration of the functions with which each is charged under this chapter." 42 U.S.C. § 1302. Section 1302 is an express delegation by Congress to the Secretary to prescribe standards and interpret the statute. Those regulations formulated and adopted by the Secretary are to be given the full force and effect as the statute itself. *See Batterton* v. *Francis*, 432 U.S. 416, 425 (1977); *Smith* v. *Vowell*, 379 F. Supp. 139, 152 (W.D. Tex. 1974), *aff'd*, 504 F.2d 759 (5th Cir. 1974). The only situation which would allow a federal court to disregard federal regulations exists when the Secretary's interpretation is clearly erroneous or unreasonable. *See State of Florida* v. *Mathews*, 526 F.2d 319, 323 n. 10 (5th Cir. 1976). There is no such contention in this case nor could there be under the present circumstances.

In the instant case, the State of Texas has seen fit to require an expected period of incapacity to be at least sixty days. The corresponding federal regulations which provide for thirty days did not become effective until 1974. In early 1974, HEW had apparently felt that the term "incapacity" was vague, and it was stated that there was a need for

"greater clarity to achieve uniformly equitable administration." 39 Fed. Reg. 4114 (1974). At the time the rule became effective, HEW reiterated the purpose of the regulation as establishing "a uniform Federal definition of incapacity of a parent." 39 Fed. Reg. 34,037 (1974). During the pendency of the above proposed rule, the thirty day requirement was criticized by welfare agencies. The majority of those agencies recommended elimination of the time period, and a minority suggested increasing the time period to sixty or ninety days. *Id.* By the retention of the thirty day rule, it is clear that the Secretary found the thirty days to be a necessary ingredient in the determination of incapacity. Obviously, a sixty day time period was proposed and rejected in favor of the thirty days.

The Secretary has determined that thirty days is to be the guiding time period. The State of Texas by requiring an additional thirty days makes those applicants ineligible who otherwise would qualify under the federal regulations. It has been held that such a situation violates the Social Security Act and is therefore invalid under the Supremacy Clause of the Constitution. *See Townsend* v. *Shank*, 404 U.S. 282, 286 (1971). *See also Philbrook* v. *Glodgett*, *supra*, at 868. Having determined that the Defendants have violated the Supremacy Clause of the Constitution, this Court need not reach the issues of due process and equal protection proffered by the Plaintiffs.

The fact that the Texas Board of Human Resources had received prior approval from the HEW is irrelevant in this Court's decision concerning the state regulations. Clearly, there can be little dispute as to HEW's position after January 20, 1978 when it informed the Defendants of the error in its prior approval. Even during the period preceding January 20, 1978, the Court would have had difficulty in according any weight to those earlier approval letters considering the fact that the pertinent federal regulation was quite clear as to its meaning and its uniform purpose. Administrative practice is only given deference by the courts where the relevant statutory language is unclear or susceptible of different interpretation. *See Shea* vs. *Vialpando*,

416 U.S. 251, 262 n.11 (1974). Here § 233.90(c)(1)(iv), which has the effect of a statute, is abundantly clearcut, and this Court is of the opinion that even in the absence of the January 20th letter, it need not take cognizance of letters from the regional office of HEW which are in direct conflict with the statute and regulations promulgated thereto.

II. THE DEFENDANTS' MOTIONS

The Defendants cite this Court to certain regulations promulgated by the Secretary of HEW which they contend require this Court to defer judgment until various administrative proceedings are conducted. Specifically, the Defendants refer this Court to 45 C.F.R. §§ 201.4 and 201.6 and § 213, the latter merely providing the procedural mechanism for implementing the actions allowed in §§ 201.4 and 201.6.

Briefly, Section 201.4 allows a dissatisfied state, within sixty days after an undesirable ruling by HEW on a proposed state plan, to file a petition asking for reconsideration. Section 201.6 allows HEW to withhold or reduce further payments to a state on the grounds that the state plan does not comply with federal regulations.

This Court considers both of these regulations to be inapposite to the present problem. The State of Texas is apparently not unsatisfied with the decision of the Department since the state's overall AFDC plan had received approval in 1976. Even if it had been disapproved, the sixty day time period allowed in § 201.4 has passed. Additionally, the Court does not see a great amount of merit to an argument that the Court should wait for a proceeding that must be instigated by the Defendants who may never in fact do so.

Likewise, the Court sees little merit in the Defendants' request as to § 201.6. Again, the Court is asked to wait for a proceeding that may or may not ever materialize. The question in this case is one for the Court to decide. There exists an obvious conflict between a state and a federal regulation. In such instances the Supremacy Clause of the United States allows this Court to prohibit such a situa-

tion. *See, e.g., Townsend* v. *Shank, supra*, at 286.

The Defendants also request in the alternative that the Secretary of HEW be joined pursuant to Federal Rule of Civil Procedure 19(a) or 20(a). In the present case, the Secretary of HEW is a totally unnecessary party. Complete relief can be accorded among the parties without his presence, and further, any interest the Secretary of HEW has in the subject of this action would not impair or impede his ability to protect that interest due to his absence. There is no possibility that any of the parties in his absence will be subject to a substantial risk of incurring double, multiple or other inconsistent obligations by reason of his claimed interest. The only interest that Mr. Califano might have is that of requiring the states to comply with federal regulations. This Court can make that decision without his presence. This Court believes that even allowing a permissive joinder of the Secretary under Rule 20(a) would be a superfluous exercise which would needlessly delay the decision of this case.

The Defendants further request that the Secretary be allowed to intervene pursuant to Rule 24(a) or (b). Both Rules 24(a) and (b) are completely inapplicable in the present case. The purpose of intervention is to allow an outsider with an interest in a lawsuit to come in as a party although he or she has not been named as a party by the existing litigants. *See* 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1901 (1972). Rule 24 can not be construed to allow a party already involved in a legal proceeding to bring in other parties. Nor does the rule allow a court to grant intervention *sua sponte*. Intervention can only occur upon a timely application by one seeking to become a party in an action. Because of the Defendants' apparent misreading of the purpose of Rule 24, this Court perceives no need to discuss it further.

Lastly, the Defendants have asked that this Court seek an *amicus curiae* statement from HEW. The United States Supreme Court has stated that the district courts should obtain the views of HEW in those situations where the lat-

ter has not set forth its views in a regulation or where there is real doubt as to how the department standards apply to the particular state regulation or program. *See Rosado* v. *Wyman*, 397 U.S. 397, 406–07 (1970). In the present case, the Court is faced with a federal regulation that is clear on its face in addition to a written notification by the HEW that the Defendants' program does not comply with the federally mandated guidelines. There is no ambiguity of interpretation or application of the federal regulations and thus there is no need for the Court to seek any further comment from HEW.

III. RETROACTIVE BENEFITS

Although prospective injunctive relief against state officers who violate citizens' constitutional rights while acting under color of state law has been allowed for seventy years, *see Ex Parte Young*, 209 U.S. 123, 155–56 (1908), the Eleventh Amendment remains a bar to plaintiffs seeking monetary awards against such officials, which awards will in actuality be paid from state treasuries. *See Edelman* v. *Jordan*, 415 U.S. 651, 677 (1974), *rehearing denied*, 416 U.S. 1000 (1974). The specific issue of payment of retroactive AFDC benefits has been discussed and decided in a number of cases. The bottom line of these decisions is that claims for recovery of retroactive AFDC benefits are foreclosed by the Eleventh Amendment. *See Edelman* v. *Jordan*, *supra*, at 677; *Houston Welfare Rights Organization, Inc.* v. *Vowell*, 555 F.2d 1219, 1227 (5th Cir. 1977), *cert. granted sub nom.*, *Chapman* v. *Houston Welfare Rights Organization*, 434 U.S. 1061 (1978). In light of these decisions, this Court is prohibited from granting any award of retroactive AFDC benefits. Although the Plaintiffs may be entitled to reapply for future benefits, they will not be allowed to receive any past payments.

IV. ATTORNEY'S FEES

Unless there is applicable statutory or contractual authorization for attorney's fees, the general American rule is that the prevailing party may not recover such fees. *See*

Alyeska Pipeline Service Company v. *Wilderness Society*, 421 U.S. 240, 257 (1975). At one time, awards of attorney's fees in cases against state agencies and their individual members were barred under the Eleventh Amendment. *See Named Individual Members of the San Antonio Conservation Society* v. *Texas Highway Department*, 496 F.2d 1017, 1026 (5th Cir. 1975), *cert. denied*, 420 U.S. 926 (1975). The passage of the Civil Rights Attorney's Fees Award of 1976, now codified in 42 U.S.C. § 1988, removed the Eleventh Amendment barrier against awarding attorney's fees for prevailing parties who bring actions under 42 U.S.C. §§ 1981, 1982, 1983, 1985 and 1986. Since this Court has granted a partial summary judgment for Plaintiffs, they can be considered the prevailing party to the extent of that judgment.

Nonetheless, a district court is not empowered to grant an award of attorney's fees to the prevailing party without some showing by that party that it is entitled to such fees. To aid a court in determining the reasonableness of attorney's fees in a § 1983 action, a number of factors need to be considered. These include: 1) the time and labor required; 2) the skill requisite to properly perform the legal services; 3) the preclusion of other employment by the attorney due to acceptance of the case; 4) the novelty and difficulty of the case; 5) the customary fee; 6) whether the fee is fixed or contingent; 7) the time limitation imposed by the client; 8) the amount of money involved and the results obtained; 9) the experience, reputation and ability of the attorney; 10) the undesirability of the case; 11) the nature and length of the professional relationship with the client; and 12) awards in similar cases. *See Rainey* v. *Jackson State College*, 551 F.2d 672, 676 (5th Cir. 1977). The Fifth Circuit has stated that it is mandatory for a district court when fixing attorney's fees to consider all of the above factors. *See Norwood* v. *Harrison*, 581 F.2d 518, 520 (5th Cir. 1978).

This Court is aware that a prevailing party should ordinarily recover an attorney's fees in a § 1983 case unless special circumstances would render such an award unjust, *see Morrow* v. *Dillard*, 580 F.2d 1284, 1300 (5th Cir. 1978), but it must first receive affidavits from counsel for the pre-

vailing party attesting to the above facts. Therefore, this Court will require the submission of such affidavits in accordance with the specifications and restrictions delineated in the accompanying Order.

V. DUE PROCESS RIGHT TO A HEARING

The Plaintiffs claimed in their Original Complaint that the Defendants had denied applications and terminated benefits without the opportunity of a pretermination hearing. Although the other allegations in the Original Complaint were constantly renewed in subsequent pleadings, Plaintiffs made no further claim concerning the lack of pretermination hearings. The only rementioning of this issue occurred in the stipulations which merely listed the number of applicants and/or recipients whose applications had been denied or grants terminated. Since it was not mentioned in the Motion for Summary Judgment or the Amended Motion for Preliminary Injunction, this Court is unsure whether the Plaintiffs are still maintaining such a claim.

In the possibility that it is still a viable contention, the Court will give brief attention to the matter. *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), concerned an action brought by recipients of AFDC payments. The Supreme Court in that case held that welfare benefits are a matter of statutory entitlement for persons qualified to receive them, *id.* at 262, and any discontinuation of those benefits must be preceded by a termination hearing which provides the recipient with procedural due process. *Id.* at 264. Therefore, if the Texas Department of Human Resources has terminated any benefits without such a pretermination hearing there has been a violation of due process. Those Plaintiffs who have merely been denied applications for aid are not entitled to a predenial hearing although 45 C.F.R. § 205.10 (a)(3) and (5) grant to such plaintiffs the opportunity for a hearing subsequent to the denial. This particular issue, however, cannot be determined upon the presently available pleadings and would need to be reserved for determination after a hearing.

Based upon the above it is hereby

ORDERED that the Plaintiffs' Motion for Summary Judgment is GRANTED in part insofar as concerns the conflict between the Texas AFDC regulations and the federal regulations, specifically the use of the number "60" in § 2830 of the state regulations in opposition to the number "30" in 45 C.F.R. § 233.90(c)(1)(iv).

It is further ORDERED that in light of the above partial summary judgment, a permanent injunction shall immediately issue enjoining the Defendants from the use of the sixty day waiting period which is in direct contravention of the federal regulations in 45 C.F.R. § 233.90(c)(1)(iv) which provides for only a thirty day expected duration of incapacity.

It is further ORDERED that the Plaintiffs' Motion for Summary Judgment insofar as concerns the award of retroactive AFDC benefits to any and all Plaintiffs is in all respects DENIED.

It is further ORDERED that the Defendants' Motion to Stay Proceedings and in the Alternative to Join or to Allow Intervention of Joseph Califano, Secretary of HEW, is in all respects DENIED.

It is further ORDERED that the Defendants' request that this Court seek an *amicus curiae* statement from HEW is in all respects DENIED.

It is further ORDERED that counsel for Plaintiffs submit within thirty days from the date of this Memorandum and Order a sworn affidavit attesting to the following factors which were present in this case, all of which shall include no information as to any legal services rendered or activities occuring after the date of this Memorandum and Order:

1) time and labor required;

2) the skill requisite to properly perform the legal services;

3) the preclusion of other employment by the attorney due to acceptance of the case;

4) the novelty and difficulty of the case;

5) the customary fee;

6) whether the fee is fixed or contingent;

7) the time limitation imposed by the client;

8) the amount of money involved and the results obtained;

9) the experience, reputation and ability of the attorney;

10) the undesirability of the case;

11) the nature and length of the professional relationship with the client; and

12) awards in similar cases.

It is further ORDERED that counsel for the Plaintiffs also submit within thirty days from the date of this Memorandum and Order an affidavit completed by an impartial attorney who has knowledge of similar actions attesting to the same factors as above, all of which shall include no information as to legal services rendered or activities occurring after the date of this Memorandum and Order.

It is further ORDERED that in the interest of justice and to facilitate a fair and orderly disposition of this case, an oral hearing be scheduled at *9 o'clock* on *February 9th*, 1979, for the purposes of

1) determining the necessity *vel non* of a class action; and

2) if the class is certified, determining whether an injunction should issue requiring the Defendants to allow some or all of the members of such class to reapply under state regulations that comply with their federal counterparts in order to have their cases reconsidered; and

3) if the class is certified, determining whether the Defendants have deprived some or all of the members of such class of their rights to procedural due process regarding the denial of applications or the termination of benefits.

If counsel for the Plaintiffs is successful at the above hearing, the Court will at that time receive for consideration any further affidavits concerning the award of attorney's fees covering the time period between the date of this Memorandum and Order and the date of the above hearing.

The Clerk shall send a copy of this Memorandum and Order to all counsel.

DONE at Brownsville, Texas, on this the *19th* day of December, 1978.

APPENDIX E

Reynaldo G. Garza
UNITED STATES DISTRICT JUDGE

United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK
August 20, 1980

TO ALL PARTIES LISTED BELOW:

NO. 79-2905—DELFINO SILVA AND JOSE MIRANDA, JR., ETC. vs. RAYMOND W. VOWELL, ETC.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,
GILBERT F. GANUCHEAU, Clerk
By *Sally Hayward*
Deputy Clerk

cc: Ms. Kathryn A. Reed
Mr. Gerald A. Garcia
Mr. Jose Antonio Gomez